John Osborne Gray's Inn

1832

AN

ABRIDGMENT

OF THE

First Part

OF MY

L^d. *Coke*'s Institutes;

WITH

Some ADDITIONS explaining many of the difficult CASES, and shewing in what POINTS the LAW has been altered by late *Resolutions* and *Acts of Parliament.*

By WILLIAM HAWKINS Serjeant at Law.

The Fifth Edition. To which is now added a large Index in the Nature of an Analysis of the most General Heads.

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THE PREFACE.

THE Authors whom I have attempted to abridge have ever been univerſally admired: The one, for his great Perſpicuity, and unconteſted Authority; the other, for his infinite Variety of curious and uſeful Learning: So that I cannot doubt but my Endeavours would be in ſome Meaſure acceptable, if I could any Way contribute to the better Remembring, or eaſier Underſtanding, of what all who ſtudy our Laws deſire to be perfect Maſters.

It has been a great Diſcouragement to the Study of the Law, that thoſe Authors, which are generally recommended to be firſt read, are in many Parts ſo very difficult, that it

is ſcarce poſſible to underſtand them, without a previous Knowledge of thoſe common Grounds, which great Men are apt to think beneath the Dignity of their Writings to take Notice of. This I fear has cauſed many to forſake their Studies with an Averſion to the Law it ſelf, and a miſconceiv'd Opinion, that generally it is not to be reconciled with the natural Notions of Right and Wrong; and that moſt of its Diſtinctions conſiſt rather in the empty Chicanery of Words, than in any real Difference in the Nature of Things. I have therefore, for the greater Eaſe of Beginners, endeavoured to explain many of thoſe Caſes which uſually appear moſt intricate at firſt Reading; and tho' I am ſenſible that many of my Explications will ſeem trifling and obvious to thoſe who have made any Progreſs in their Studies, yet if they may any Way prove uſeful to them for whoſe Benefit alone they were deſign'd, I hope they will not be condemned as wholly unſerviceable to the Publick.

Many alſo have been diſcouraged from laying the Foundation of their Studies in thoſe excellent Books, becauſe great Part of them is not Law at this Day; and they cannot eaſily perſwade themſelves to read ſo much abſtruſe and obſolete Learning, with that Attention which is neceſſary to the perfect Underſtanding of it. But whoever conſiders how great a Coherence there is between the ſeveral Parts of the Law, and how much the Reaſon of one Caſe opens and depends upon that of another, will, I preſume, be far from thinking any of the old Learning uſeleſs, which will ſo much conduce to the perfect Underſtanding of the Modern. I could by no Means therefore think it proper to leave out any Point of Law, meerly for its being diſuſed; but that young Students may know what is now in Uſe, I have ſhewed in what Caſes the Law has been alter'd by Parliament, or my Lord Coke *has been contradicted by Modern Reſolutions.*

I have

I have taken Care to have all my own Additions printed in a particular Character; ſo that I hope I ſhall not be cenſured for having blended them with what depends on the Authority of theſe incomparable Authors, ſince no one can be in Danger of being led into any Miſtake thereby.

A N

AN ABRIDGMENT OF The First Part of my Lord COKE's Institutes.

Of FEE-SIMPLE.

TEnant in Fee-simple is he, who hath Lands or Tenements to hold to him and his Heirs for ever.

The Word *Tenere*, from which Tenant is derived, sometimes signifies to have the Estate of the Land, as non *Tenet* pleaded by the Tenant to a *Præcipe*, signifies that he has not the Freehold of the Land in Question: Sometimes it signifies to hold Land by some Service: Sometimes it signifies to be bound, as *Teneri & firmiter obligari* in a Bond, *&c.*

Feodum idem est quod hæreditas, and signifies that Land belongs to a Man and his Heirs. Sometimes Land, as holden of a Lord by some Service, is called his Fee; as when Tenant in Avowry pleads *extra feodum, &c.* this signifies that the Land is not holden of the Avowant, but none can plead this, un-

less he takes the Tenancy upon him, *for it is unreasonable, that the Lord's Title to the Seigniory should be disputed by one who has nothing to do with the Tenancy.*

Simplex idem est quod Legitimum vel Purum, therefore a Fee conditional, or qualified, are not properly Fees-simple.

Hereditaments are either Real, as Lands and Tenements; or Personal, as Annuity; or mix'd, as Dignity of Earl, *&c.* of such a Place.

Some can take a Fee only for the Benefit of others, as an *(a)* Infidel or Alien, who cannot hold any Freehold, and if they make such Purchase, the K. on Office found shall have it. If they die, the Law casts their Estate on him without Office, *for the Freehold cannot be in Abeiance*; nor can an Alien take a Lease Y. of Land, but if he be a Merchant *amy*, he may take Lease Y. of a House for his Habitation, for he cannot carry on his Merchandize without it; but if he dies or leaves the Realm, K. shall have it: If K. makes him a Denizen, he may purchase, and his Issue born after his Denization shall inherit; if he dies without such, the Land shall escheat to the Lord.

(a) 7 Co. 17.

The Purchase of one attainted of Treason or Felony goes to the King; the Purchase of one guilty of Felony, and afterwards attainted, shall escheat to the Lord; for *in the first Case the Purchaser was dead in Law when he purchas'd, not so in the other.*

If any Corporation civil or religious purchase Land without Licence, by the Statute of *Mortmain* the next Lord may enter within the

the firſt Year after the Purchaſe, in his Default the next *Meſne* Lord within the next half Year may enter, and ſo ſhall all the *Meſnes* in their Turns; in Default of all, K. ſhall have it for ever. By a favourable Conſtruction, K. ſhall preſently ſeize Inheritances, which lie not in Tenure. An Annuity, becauſe it is Perſonal, is not Mortmain.

One when at full Age may perfect, or without Cauſe alledged, waive a Purchaſe made by him within Age; ſo may his Heir, if he dies without agreeing at full Age.

Non compos making a Purchaſe, and recovering his Memory, can't waive it; agree to it he may, if he doth not, his Heir may waive it.

Abbot purchaſing without Conſent of his Covent, cannot waive it at all; nor can his Succeſſor, unleſs it was to the Prejudice of the Church, as if too great Rent were reſerved, *&c.*

A Wife can take no Eſtate from her Huſband, but ſhe may take from a Stranger, but the Husband may deveſt it; if he doth not, the Wife after his Death may waive or perfect it; ſo may her Heir, if ſhe die without doing either.

Whoever takes a Fee, muſt either take it in his natural Capacity, or in a politick Capacity; *therefore*, tho' anciently a Grant by the Lord to his Commoners, that their Way leading to their Waſte ſhould not be ſtreightned, or a Grant to a Lord, *& hominibus ſuis tam liberis quam nativis*, or Pur-

chase of Land by Parishoners or Inhabitants, or Church-Wardens, or *probi homines de Dale*, were holden to be good; yet the Law is otherwise now. But Church-wardens and Parishioners may purchase Goods, *for they are a special (a) Corporation for this Purpose.*

(a) Keil. 42.

Wife of *J. S.* Earl of *P.* Dean of *D. &c.* may take by such Name, and the Purchase will be good, tho' the Christian Name be mistaken for there can be no Doubt who is meant by such Name, *& utile per inutile non vitiatur:* But in pleading, the proper Name must be shewn. Nor is it safe in Pleading to translate Surnames, as to call one named *Williamson filius Willi*, *for tho' our Christian Names were for the most part known to the* Romans, *and we know how they would have called one of such a Name in Latin, it is otherwise of Surnames.* Name of Confirmation, if different from that of Baptism, ought to be used. *Primogenitus filius, omnes liberi aut hæredes J. S.* are good Names of Purchase.

No Limitation whatsoever to a Bastard before he is born can give him an Estate, tho' the Words are to the next Issue of *J. S.* begotten of *J. N.* Legitimate or Illegitimate. So that tho' he afterwards becomes Bastard Eigne, yet is he not helped.

But a Bastard having gained a Name by Reputation, may purchase by it, and all other lawful Subjects, tho' Ideots, Lepers, *&c.* except Monsters, and Men of Religion professed of some Order. An Hermaphrodite may purchase according to the Sex that prevails.

The

The Grant of an Office by King or Subject, concerning the Adminiſtration, Proceeding or execution of Juſtice, or King's Revenue to one unskilful, is void, for the Publick is injured by it. Nor is a judicial Office grantable in Reverſion, *for tho' the Grantee be never ſo fit at the Time of the Grant, he may become unfit when it takes effect.* Nor can the Stewardſhip of a Manor be granted to an Infant.

K. may be ſaid to be ſeized of an Office (tho' he can't be an Officer) in reſpect of his Power to grant it to another.

By 27 *El.* 4. A Purchaſer for good Conſideration ſhall avoid all former fraudulent Conveyances. One having a good Leaſe for ſixty Years, forged one for ninety Years, and ſold the forged Leaſe, and all his Intereſt in the Land to *J. S.* this is no purchaſe *of the true Leaſe* within that Statute, *i. e.* for valuable Conſideration, for *J. S.* knew not of it, nor contracted for it, *nor was it at all conſidered in the Bargain.*

Terra, derived *a Terendo*, ſtrictly ſignifies 4
arable Land only, but in a legal Senſe it comprehends all Sorts of Ground. Land built is moſt worthy, and ſhall be firſt demanded in a *Præcipe*; for Things are reſpected in Law as they are more or leſs uſeful to Man. Water is not demandable by that Name, but ſo many Acres of Land *aquâ coopert'*. Grant of Land paſſeth Houſes built on it, for *cujus eſt ſolum, ejus eſt uſque ad Cœlum.*

Tho' a Man by no ſort of Conveyance can limit a Fee to move out of one P'ſon into an-

other, as he ſhall appoint; yet by Cuſtom, a Fee may be moveable: As where 100 Acres have Time out of Mind been ſet out yearly to ſeveral Perſons, ſo many to one, ſo many to another, ſo that the Number only is certain, the Place uncertain; ſo if it be agreed on Partition betwixt Parceners, that one ſhall have the Land the firſt Year, or half Year, the other the next, and ſo by Turns for ever, in which Caſe the Fee of each of them is ſeveral, and moveable, as well as the Poſſeſſion. *Note, That Partitions between Parceners are favour'd and privileged, becauſe their undivided Eſtate was created, and caſt on them merely by Act of Law.*

Grant of *Veſtura Terræ* paſſes the Underwood and Sweepage; but the Soil, Timber or Mines paſs not by it, nor by Grant of the Herbage, tho' Livery of Seiſin be made. *But it is holden,* 1 Vent. 393. *that the Grant of* Veſtura Terræ *with Livery paſſes the Soil, but the Grant of* Prima Veſtura *for no certain Time paſſes the firſt Cutting only, from ſuch a Day to ſuch a Day it paſſes the Soil.* If one Grants to the Grantee of the Herbage of his Wood all his Land in his Poſſeſſion, the Whole ſhall paſs, *for he is ſo far poſſeſſed of the Whole, that he may have an Action of Treſpaſs for a Treſpaſs in any Part of it.* Grant of *ſeparalis Piſcaria* paſſes neither Water or Soil; *Aqua* paſſes the Water and *Piſcary*, but not the Soil: All the Profits, with Livery, paſs the Soil; *Boſcus* paſſes Soil as well as the Timber of any Wood-Land; *Boſcus Creſcens* paſſes

paſſes no leſs, *for* Creſcens *is idle, and ſignifies no more than the Law would have implied.* *Alnetum*, and ſuch like Words paſs Wood-Land of ſuch ſort, but no other. *Paſtura* not only paſſes Land of that Nature, but alſo Feedings in another Soil. *Paſcuum* ſignifies any Land whatſoever uſed for feeding of Cattle. But Land can't be demanded by the word *Paſcuum* in a *Præcipe*.

General Words, as Honour, Iſle, Caſtle, 5.
will paſs Things compound, as Honour, or Caſtle will paſs divers Manors, or Things Simple of different Natures, as Fearm will paſs Houſes, Lands, Tenements; a Plow-Land, or ſo much as one Plough can till, an Ox-gang, or as much as one Ox can till, may paſs Arable, Meadow, Paſture, and Wood, *&c.* neceſſary for ſuch Tillage; Grange paſſes Barn, or Stable, with its Curtilage; Meſſuage paſſes Houſe, Orchard and Curtilage; *Stagnum* or *Gurges* paſs Water and Soil, (in a *Præcipe* for *Gurges*, *&c.* the Eſplees muſt be laid in taking of the Fiſh;) Foreſt, Warren, Chaſe or Vivary, paſs both the Ground and Privilege.

A Grant *de centum libratis Terræ will* paſs Land of that Value.

Tenement paſſes any Thing whereof a 6.
Man may be ſeiſed, *ut de libero Tenemento*; Hereditament, any Thing wherein a Man may have an Inheritance.

If one makes a Feoffment with general Warrantry, *i. e.* againſt all Men, *and there is no Mention made of the Writings concerning the Land*, the Feoffor ſhall retain all that are material for the Defence of the

Title, and that ſerve to deraign the Warranty Paramount, *i. e. That entitle him to vouch ſome other bound to warrant the Land*; but the Feoffee ſhall have thoſe that concern the Poſſeſſion, as Court-Rolls; but if the Warranty be only againſt the Feoffor and his Heirs, the Feoffee ſhall have all the Deeds; *for in the firſt Caſe the Feoffor is bound at his Peril to defend the Title, and therefore ſhall keep what will enable him to do it; in the latter Caſe he is ſafe, ſo long as he impeaches not his own Feoffment.*

There be eight formal Parts of a Deed of Feoffment. 1. The Premiſſes, which Name the Feoffor and Feoffee, and the Certainty of the Land to be convey'd. 2. The *Habendum*, which names the Feoffee again, and limits the Certainty of the Eſtate. 3. The *Tenendum*, which muſt at this Day be of the Chief Lord, by Force of the Statute of *Quia emptores Terrarum*. 4. The *Reddendum*. 5. The Clauſe of Warranty. 6. *In cujus Rei Teſtimonium ſigillum meum apoſui*, containing the Sealing, which is an eſſential Part. 7. The Date containing the Day, Month, the Style of the K. and Year of the Lord. It was anciently holden, that a Deed dated before the limited Time of Preſcription was not pleadable, therefore they often omitted the Date. If no Place be mentioned, the Feoffee may alledge it made where-ever he will. 8. The Clauſe of *his Teſtibus* of late diſuſed, was antiently written by the ſame Hand which the Deed was, and the Deed was read to

the

the Witneſſes, and then their Names enter'd.

No Exceptions are good againſt a Witneſs, but thoſe that prove him to want Diſcretion, to be a Party in Intereſt, an Infidel, or a Perſon Infamous, as one attainted for giving a falſe Verdict, or of Conſpiracy at the K.'s Suit, or Convict of Perjury, *Præmunire*, Forgery on the 5th of *El.* or Felony, or one that by Judgment hath loſt his Ears, or ſtood in the Pillory or Tumbrel, or been branded, (*quæ ſunt minoris culpæ ſunt majoris infamiæ*;) or Champion recreant.

But many Exceptions, that are good againſt a Juror, are not ſo againſt a Witneſs, as Affinity or Conſanguinity, how near ſoever. (*For if a Juror be challenged, his Room may eaſily be ſupplied by others; but it is otherwiſe of a Witneſs.*) So of Outlawry in a Perſonal Action. And one named a Diſs'or in the Writ hath been allowed to be a Witneſs to the Deed; *otherwiſe the Demandant by a fictitious Suppoſal, making the Witneſſes Parties to the Action, might defraud the Tenant of the Benefit of their Teſtimony.*

But where the Witneſſes in a Deed are to be joined to the Jury, (as they frequently were in former Times, by proceſs awarded againſt them, as well as the Jury,) the ſame Exceptions that are good againſt a Juror are good againſt them, becauſe if they ſhould, with the Jury, find it to be the Deed of the Party, no Attaint will lie, for that more than twelve affirm the Deed:

Yet an Attaint will lie againſt the Jury, if they ſhould find that it is not his Deed, for the Witneſs cannot teſtify a Negative. *For tho' they may directly ſwear, that ſuch a Deed is the Party's Deed, they can't ſwear the contrary; for tho' this may be collected from what they poſitively ſwear, their Office is only to teſtify what they know, not to make Inferences from it.* When Witneſſes are joined to a Jury, there muſt be more than one.

When a Trial is by Witneſſes, as of the Challenge of a Juror, or Summons of a Tenant, the Affirmative ought to be proved by two, or more. But when the Trial is by Verdict, Judgment is given on that, and that is given on Evidence. *Violenta Præſumptio eſt plena Probatio*; as if one be ſtabbed in a Houſe, and another run out of it with a Knife bloody, and none elſe in the Houſe: *Præſumptio probabilis* moves little, *Præſumptio levis* moves not at all. Wife can't be Witneſs for or againſt her Husband. Nor can a Party to an uſurious Contract be a Witneſs againſt the Uſurer, tho' another informs; for by this Means he would avoid his own Bond.

7. K.'s ancient Charters of Inheritance had the Clauſe of *his Teſtibus*, as thoſe of Nobility ſtill have; in K.'s other Grants, *teſte meipſo* is at this Day uſed inſtead of it.

A Deed of Feoffment may be good without any of the eight formal Parts; as if Land be given to *A.* and his Heirs, *without any Habendum, &c.* or to hold to *A.* and his Heirs, without naming him before the

Haben-

Habendum, yet both Deeds are good. *For the word* Heirs, *which alone is an essential Word, is not wanting, and no Deed shall be void which by any Construction can be made good*, but it must be sealed and delivered.

None born out of lawful Wedlock can be an Heir. Nor a Monster, *i. e.* one wanting Human Shape, *as having a Dog's Head*; but one having Fingers or Toes too many or too few, or Limbs distorted, is no Monster. Hermaphrodites shall inherit according to the Sex that prevails.

An Alien can neither inherit nor have an Heir; one made a Denizen by K.'s Letters Patent may purchase Lands, and his Issue, born after the Denization, may be Heir to him. One attainted of Treason or Felony can neither inherit, nor have an Heir; and his Blood is so corrupted by the Attainder, that he cannot be absolutely restor'd but by Parliament: But if a Person attainted be pardoned by the King, and purchase Land, and have Issue a Son, and die, such Son shall be his Heir; but if the Father have an elder Son alive at the Time of his Death, born before the Attainder, the younger Son born after cannot be Heir to the Father; *for the elder Son tho' he be disabled to inherit, yet is still the elder Brother, and the Younger cannot be Heir while he is alive.*

But the Issue of one made a Denizen shall inherit the Father, tho' he have an elder Brother alive, born while the Father was an Alien: *For Denization has not such a Retro-*

Retrospect as Naturalization, which makes a Man a natural Subject ab initio; *but a Denizen derives his very Essence as a Subject from the Denization, and his Son born before never had any more Right to inherit, than if he had not been his Son at all.*

It is clear, that the Sons of one Attainted, born before the Attainder may inherit one another. But my Lord *Coke* holds otherwise of the Sons of an Alien, or Person attainted; *but has been since contradicted, for a Brother may in* Mortanceſtor *make himſelf Heir to his Brother without mentioning the Father.*

1 Sid. 193. 1 Lev. 60. Vaugh. 274. 1 Ven. 413

Outlaws in Debt, Hereticks convict, perſons excommunicate, or attainted of *Præmunire*, Lepers, Ideots, *&c.* may be Heirs. Child born in ſecond Marriage within nine Months after the firſt Husband's Death, may be Heir to the firſt or ſecond Husband, which he pleaſes. At this Day, an Heir cannot ſue a Bond made to his Anceſtor.

Fiſh at large in a Pond, Doves in a Dove-houſe, go to the Heir, thoſe that are caught to the Executors.

Nemo eſt Hæres viventis.

1 Rol. Ab. 832. con.

By a Gift to *A.* and his Heir, the Heir can take nothing, *not an Inheritance, becauſe there is no Poſſibillity of its continuing for ever; not a Freehold deſcendible, becauſe ſuch muſt continue during Lives in Eſſe only, and no Man can create a new Eſtate.* A Gift to *A.* or his Heirs paſſes a

State

State for Life only; a Gift to *A.* and *B. & Hæredibus*, passes no more for the Uncertainty; but a Gift to *A. & Hæredibus*, gives a Fee, without adding *suis*.

A Lease Y. is made to *J. S.* Parson and his Successors, and after a Release is made to him and his Successors, yet he takes but for Life. For the Word *Successors* in both Cases is void, *in the first, because no sole Corporation, except K. can be possess'd of a Chattel; in the second because the Release can't enure to him in that Capacity, in which he had nothing before.* Grant by K. *Decano & capitulo habendum hæredibus & successoribus suis*, vests in their politick Capacity only: Grant to *J. S.* and his Heirs and Successors, vests in his natural Capacity only; *and tho it may be said, that the K. is deceived in using the word* Heirs *in the first Case, and that of* Successors *in the second, yet those Words, which were used only to make the Grant more firm, shall not be construed to make it void.*

A Gift to *A. & liberis suis*, and their Heirs, gives a joint Fee to him and his Children then born. The word *Heirs* includes all Heirs whatsoever, whether near or remote.

The *Isle of Man*, tho' a Territory distinct from the Kingdom, has been granted under the Great Seal, and is therefore descendible by the Rules of Common Law.

Feoffment is the only Conveyance, which when the Feoffor's Entry is lawful, doth destroy all wrongful Estates, *because the Feoffor re-entring to make Livery, re-continues*

nues his former Eſtate. All corporeal Inheritances *did at Law* paſs by Feoffment, without Deed: Incorporeal Inheritances, *i. e.* ſuch as are neither Tangible nor Viſible, paſs by Delivery of the Deed. *Charta* properly ſignifies a Deed of Feoffment; *Factum* any Deed whatſoever. *Do* is the apteſt Word of Feoffment.

A Fee may paſs without the Word *Heirs.*

1. By Deviſe, by the *expreſs* Intent of the Deviſor, as were Land is deviſed to *A.* and that he ſhall pay 20*l.* for it to the Executor; ſo a Deviſe to *A.* to give, or ſell, or for ever, or in Fee-ſimple, or to him and his Aſſigns for ever, or to him, *& Sanguini ſuo*, give a Fee-ſimple, but a Deviſe to *A. & ſemini ſuo*, gives an Entail only; a Deviſe to him and his Aſſigns, gives a State for Life only.

2. By a *Fine ſur conuſans de droit come eeo que, &c.* for it ſuppoſeth a precedent Gift in Fee.

3. By a Releaſe of one Jointenant or Parcener, to one of the others only, or to all; or by Releaſe of Right by Diſs'ee to Diſs'or *becauſe the Perſon to whom it is made is ſeiſed of a Fee before.* In like manner by a Releaſe of a Seigniory or Rent-Charge made to the Tenant of the Land; *for tho' it ſome Purpoſes it may be ſaid to paſs an Eſtate, it gives no Benefit to the Tenant, by Extinguiſhment of the Eſtate of him releaſes.*

4. By Recovery, *for where a Fee is manded by the Writ, the Judgment muſt intended to purſue it.*

5. By Creation of Nobility by Writ, without any Limitation, which of it self ennobles the Blood to a Man and his Heirs lineal, unless the Writ limit it to the Heirs males, *&c.* But Creation of Nobility by Patent, which is of late more generally used, gives no Inheritance without proper Words.

6. In Gifts that take effect by Reference; as if *A.* give Land to *B.* and his Heirs, and then *B.* enfeoff *A.* as fully as *A.* infeoffed him.

7. In Gifts of Frankmarriage, or Frankalmoin, *for the Law had a particular Favour to works of Piety, and the Advancement of Families by such Gifts*; and ancient Grants must be expounded, as the Law was taken when they were made.

8. In Gifts to K. or Corporation aggregate; *for they never die.*

9. In Grant of Rent to a Parcener to make a Partition equal; *for it is granted in lieu of her Inheritance of the like Value given her by Law.* Vid. Supra. 10.

10. In the Grant of the Privilege of an Assart by K. at a Justice-Seat; for there is a special Law of the Forest.

11. But the words, Heirs or Successors, are absolutely necessary to pass a Fee in all Grants and Feoffments, Releases and Confirmations enlarging Estates, Warranties, Bargains and Sales, *&c.*

All a Man's Sons shall by the Custom equally inherit Gavelkind Land; but the Eldest alone shall take a Remainder limited to the right Heirs of the Father. A Fee may

may be got wrongfully by Diſs'n, *&c.* or by a bare Agreement *in Pais* to a Diſs'n to one's Uſe

A Purchaſer of Lands in Fee dying without Iſſue, Brother or Siſter, his next Couſin collateral of the whole Blood, becomes his Heir; but his Couſin of the half Blood may be his Heir of a State-tail, *for the Deſcent of ſuch Eſtates is governed by the Form of the Gift in which the Donor's Will is contained.* Lineal Deſcent is in a right Line from Father to Son, Collateral is for Default of lineal Heirs, as to one's Father's Brother, or Grandfather's Brother, *&c. Hæres in linea recta præfertur hæredi in linea tranſverſali, & propinquior excludit propinquum, propinquus remotum, remotus remotiorem.*

One may be next of Kin, *jure repreſentationis*, or *jure propinquitatis*; the former ſhall take as Heir, the latter by Purchaſe. As if I have two Nephews, *A.* the elder, and *B.* the Younger; and *A.* have Iſſue and die, and I purchaſe Land in Fee, and die without Iſſue, the Iſſue of *A.* ſhall be my Heir; for whatſoever the Anceſtor, if living, ſhould have inherited, the lineal Heir, *jure repreſentationis*, ſhall inherit, but if a Rem'r had been limited to my next of Blood, *B.* ſhould take it before the Iſſue of *A.* becauſe he is next, *jure propinquitatis.*

If a Son purchaſe Land in Fee and die without Iſſue, his Uncle ſhall be his Heir, not his Father, for it is a Maxim in Law, that Land cannot lineally aſcend; yet the Father is next of Blood to the Son, and ſhall take a Rem'r by Purchaſe limited to the

ext of Blood to the Son. And where the Uncle inherits the Son, he is not absolutely leir; for if the Father have a Son born afterwards, he shall enter upon the Uncle; so f a Sister inherit her Brother, and the Father have afterwards Issue a Son, he shall enter into the Land as Heir to his Brother, nd if he have a Daughter and no Son, she hall be Coparcener with her Sister.

11. Where the Uncle is Heir to the Son, and nters into the Land, or presents to a Church, or gets Seisin of the Rent descend-d, *&c.* and dies without Issue, the Father hall have the Land, Advowson, Rent, *&c.* s Heir to the Uncle; but if the Uncle die before he has gained an actual Seisin, the Father cannot be Heir; or if the Son and Uncle both die seised only of a Rev'n expectant on a Freehold, the Father cannot be Heir, for he that claims as Heir in Fee, must make himself Heir to him that was last actually seised of the Freehold and Inheritance.

12. The Uncle shall have Benefit of a Warranty made to the Son and his Heirs, but f he die without Issue, the Father shall have no Advantage thereof; so the Uncle being dis'ed should *at Law* have been bound by a Warranty made by the Son to the Dis'or; but if he had afterwards dy'd without Issue, the Father being his Heir, should not have been bound thereby; for Warranty always descends to the Heirs of him that made it, or of him to whom it was made. If the Son conclude himself by pleading concerning the Tenure and Services

of

of Land, the Uncle shall be bound by it; so shall not the Father, being Heir to the Uncle, because he cannot be Heir to the Son; but the Father, *as Tertenant* shall be bound by Estoppels which run with the Land.

If a Purchaser of Land in Fee die without Issue, those of his Blood of the Part of his Father shall inherit such Land, and those of the Male Line of the Part of the Father tho' more remote, are always preferred; *therefore the Brother or Sister of the Father's Father, or of the Father's Father's Father, or of any other Ancestor in the Male Line, and their Representatives, shall first inherit; on Failure of such Cousins, those of the Blood of the Father's Mother, or of the Father's Father's Mother,* &c. *shall inherit. And Q. if those of the Blood of the Latter shall not be preferred, because there is a longer Descent of Male Ancestors from her?* Pl. C. 448. And if a Purchaser have no Heir of the Part of his Father, the Heir of the Part of his Mother shall inherit; as the Brother or Sister of the Mother, or of the Mother's Father, or of the Mother's Father's Father, *&c.* who shall inherit before any of the Blood of the Mother's Mother; but if one die seised of Land which descended to him as Heir to his Mother, or *any of her Ancestors*, the Heirs of the Part of his Mother only shall inherit it; so *contra*, if he die seised as Heir to his Father, *&c.* for whoever takes Land in Fee by Discent must be of the Blood of the first Purchaser.

A. seised as Heir on the Part of the Mother, makes a Feoffment, and takes back a State in Fee, and dies without Issue; this is a new

new Purchaſe, and ſhall go to the Heir the Part of the Father. If he make a offment on Condition and die, and the ir on the Part of the Father enter for a each, the Heir on the Part of the Mother all enter on him; *for the Feoffment being feated, the Land is in ſuch Plight as if never had been made.* If he make a offment, reſerving a Rent to him and his eirs, and die, the Heir of the Part of the ather ſhall have it; but if he make a Leaſe or Y. or Gift in T. the Heir of the Part the Mother ſhall have the Rent, as in- dent to the Rev'n; ſo if one ſeiſed of a anor, as Heir on the Part of the Mother, d made a Feoffment of Parcel thereof be- re the Statute of *Quia emptores*, reſerving Rent in Fee, the Heir of the Part of the other ſhould have had it, as being Parcel the Manor; and if a Man have a Rent- ck of the Part of his Mother, and the enant grant that he and his Heirs may diſ- rain for it, his Heir of the Part of the Mo- er ſhall have the Diſtreſs as appurtenant the Rent. If one ſo ſeiſed make a Feoff- ent to the Uſe of him and his Heirs, e Heir (a) of the Part of the Mother ſhall ave the Uſe. If ſuch Heir have a Seigni- ry, and the Tenancy eſcheat to him, the eir of the Part of the Mother ſhall have t. If the Tenant of Land deſcended from the other be impleaded, and vouch, and recover gainſt the Vouchee and die, the Heir of the art of the Mother ſhall ſue Execution.

Jane S. has Iſſue *A.* and dies, and Land s given to *A.* and his Heirs on the Part of his

(a) *So is the Law now ſettled.* 3 Lev. 407.

his Mother, or a Rem'r is limited to t
Heirs of *Jane S.* and afterwards *A.* di
without Iſſue, the Heirs of the Part of t
Father ſhall inherit, becauſe the Fee veſte
in *A.* as a Purchaſer, and no Man ca
create a new Inheritance; for which Cauſe
if Land be given to a Man, and his Heir
Males, the Law rejects the Word Males; y
Land may be given to a Man and his Heir
on the Part of the Father. Litt. Sect. 354. i
which Caſe none of the Heirs of the Part o
the Mother ſhall ever inherit; but in ſuch
Caſe the Inheritance, as long as it continues,
deſcends according to the Rules of Law, tho
it be determinable for Want of Heirs on the
Part of the Father. If there be Lord, *Fem*
Meſne and Ten't, and the *Fem* bind herſelf
and her Heirs to accquit the Ten't, and marry,
the Ten't grant to the Husband and his Heirs,
that they ſhall not be bound to acquit him;
yet after the Death of the Husband and
Wife, their Iſſue, as Heir to the Wife, ſhall
be bound to Acquittal. *For it ſhall not be in*
the Power of one Anceſtor, by any Act done
to or by him, to take from another the Power
of binding one that is common Heir to both.

If one die ſeiſed of Land as Heir of the
Part of his Father, it ſhall rather eſcheat
than go to any one that is not Heir of the
Part of the Father; ſo *è converſo*, where
Lands deſcend from the Mother. As Land
may eſcheat to the Lord, for want of Heirs
of the Blood of the firſt Purchaſer, ſo may
it by Judgment againſt the Ten't for Fe-
lony three Ways, *Aut quia ſuſpenſus per Col-*
lum; aut quia Abjuravit Regnum; aut quia
utla-

agatus; but no Land ſhall be forfeited him that is hang'd by Martial Law, *in ore Belli.* The Land, whereof one attaint- of high Treaſon was ſeis'd, eſcheats to of whomſoever holden; but if the Son attainted of Treaſon, and the Father Vide Supra
e ſeiſed, the Land ſhall eſcheat to the 11.
ord, for the Father dies without Heir. No and ſhall be forfeited by outlawry on Pro-
ſs on a *Writ of* Appeal before *the Plaintiff* b
s counted, but that which the Deft' had the Time of the Outlawry pronoun-
d; but by Outlawry on an Indictment, l is forfeited which he had at the Time the Felony done; for in the firſt Caſe, the ecord whereon the Forfeiture is ground-
, ſhews not the Time when the Felony as committed, but in the ſecond it does.

Land given to a Body Politick, goes back o the Donor when the ſame is diſſolved.

Land always deſcends to the worthieſt of 14
lood; therefore the elder Brother, and all is Poſterity, ſhall inherit before the young-
, or any of his; and all the Females of the art of the Father, before any of the Males the Part of the Mother.

None ſhall be Heir of Land in *Fee-ſimple*, r to a Warranty, or ſue an Appeal of eath as Heir, unleſs he be of the whole lood, *viz.* both of the Father and the Mo-
er. c

If an elder Brother purchaſe Land in Fee, nd die without Iſſue, his Siſter of the hole, not his younger Brother of the half lood, ſhall be his Heir; but where the Uncle is Heir to the elder Brother, and l

enters

enters and dies without Iſſue, the younger ſhall be his Heir, becauſe he is of the whole Blood to him.

If Ten't in Fee of Land, Rent, Seigniory, Advowſon, and Uſe, *&c.* have a Son and a Daughter by one *Venter*, and a Son by another, and die ſeiſed, and the elder Son die without Iſſue before actual Seiſin, the younger Brother ſhall have them as Heir to the Father; but if the elder Brother had granted an actual Seiſin, the Siſter ſhould have them as Heir to him, *quia poſſeſſio fratris de feodo ſimplici facit ſororem eſſe heredem*; which depends upon the Maxim, that whoever claims a *Fee-ſimple* as Heir, muſt be Heir to him that was laſt actually ſeiſed thereof, (or to the Purchaſer.) But if *A.* ſeiſed in ſpecial T. with a Rem'r in Fee, have two Sons by divers Venters and die, the elder as Heir in T. enter and die without Iſſue, the younger as Heir to the Father ſhall have the Fee, becauſe the elder Brother was not actually ſeiſed of the Fee-ſimple, but only of the State in T.

If the Father make a Leaſe Y. rendring Rent and die, and Leſſee enter, and the elder Son die before he has received the Rent, yet the actual Poſſeſſion of Leſſee Y. is the actual Poſſeſſion of the elder Brother, and the Siſter ſhall be Heir. So if one enter into the Land as Guardian in Socage, or Chivalry, to the elder Son. But if the Father make a Leaſe L. and die, and the elder Son receive the Rent and die, the younger Brother ſhall have the Land as Heir to the Father, becauſe the elder Brother was not ſeiſed of

he Freehold of the Land; but if Baſtard ſigne receive Rent reſerved by the Father n ſuch Leaſe, and have Iſſue and die, the *Mulier* ſhall be barr'd, *for he cannot prove he other a Baſtard after his Death.*

The elder Brother enters and endows his ather's Wife of a 3d Part, and dies with-ut Iſſue, the younger Brother ſhall have he Rev'n of the ſaid 3d Part; but if he elder had made a Leaſe L. and died, nd the Leſſee had endowed the Wife, and Ten't in Dower had dy'd *during the Life f Leſſee* L. the Siſter, as Heir to the elder rother, ſhould have had this Rev'n: or in the firſt Caſe, the Endowment of he Wife defeated the elder Brother's Seiſin f the 3d Part, *and the Rev'n thereof de-ended on an Eſtate which the Wife was in rom her Husband, ſo that in Judgment of Law a Rev'n only deſcended*; but in the o-her Caſe, the Rev'n depended on a Leaſe nade by the elder Brother.

The Son's general Entry into a Parcel of and gives him an actual Seiſin of all the and in the ſame County, whereof he is ſei-ed in Law; but where another is ſeiſed of he Land to which he has a Demand, in re-pect of a Diſs'n, Alienation in Mortmain, Condition broken, *&c.* his general Entry in-o Part, is good for ſo much only.

There ſhall be no *poſſeſſio Fratris* of a ent, Advowſon, Common, *&c.* If the elder rother die before the Church becomes void, r the Rent due, *&c.* But a Husband ſhall e Ten't by Courteſy in Reſpect of his Wife's Seiſin in Law, where it was impoſſi-

ble

ble for him to get an actual Seisin, *for in the first Case it stands indifferent whether the Heir of the Father or Son shall have the Land, and therefore the actual Seisin of either of them shall decide it; but in the Second, the Favour, which the Law shews to the Husband that has Issue by his Wife, shall not be lost without some Default in him.*

The Possession of the elder Brother shall not exclude the younger, and make the Sister his Heir of an Estate T. or a Dignity, or Crown-Land; for in these Cases the Law regards him that is Heir to the first Donee, or to him that was first created Noble, and the Crown-Lands *jure Coronæ* attend the Crown; and if the King purchase Gavelkind Lands to him and his Heirs, it shall descend to his eldest Son only, and if he have the Crown as Heir to his Mother, such Land shall descend to the Heir of the Part of the Mother; if the right Heir be attainted, yet shall the Crown descend upon him, *and when he takes (a) upon him the Royal Dignity*, the Attainder is discharged.

(a) 1 H. 7. 4.

The word *Inheritance* is not only properly used where one has Land by Descent, but where he has Land in Fee, or Tail by purchase; as in a Writ of Right, or *Cui in Vitâ*, for Land purchased, the Words of the Writ are, *quam clamat esse jus & hæreditatem suam*. But in the Stat. of *W.* 2. *c.* 5. by Construction of the whole, 'tis taken only for the Wife's Inheritance by Descent.

One may have an Inheritance, tho' he neither take it by Descent, nor properly by Purchase, but by Creation; as where the

King creates a Man a Peer by Letters Patents or by Writ: The first ennobles a Man, tho' he never sits in Parliament, but the second does not until he sits there; for the Issue, whether he be a Baron or no, must be tried by the Parliament Records; therefore a Peer of another Kingdom cannot be sued here by that Name. One may be made Noble for Life only, not for Y. A Woman marrying a Peer is thereby made Noble during her Life, unless she afterwards marry a Commoner; but one born Noble continues so, let her marry whom she will.

Of Things whereof one may have a manual Occupation, Possession, or Estate, as of Lands, Rents, *&c.* he shall plead that he is seised *in Dominico suo, ut de feodo*; of Things which lie not in such manual Occupation, as an Advowson, *&c.* he shall say, that he is seised *ut de feodo.* It may be observ'd from hence, that in Judgment of Law, a Man can receive no Profit of an Advowson, therefore at Common Law no Damages were recoverable *in quare impedit*, and Guardian in Socage cannot present, because he can take nothing for it, and he shall meddle with nothing, but what he may be liable to account for: In a Writ of Right of Advowson, the Patron shall lay the Esplees, not in himself, but in the Incumbent. 17.

There is a great Difference between *Advocatio medietatis Ecclesiæ*, & *medietas Advocationis Ecclesiæ*; the first is when there be two several Patrons and Incumbents of the same Church, in which Case, it either Patron

be disturbed, he may have a *quare impedit &c. præsentare ad medietatem Ecclesiæ*, or
18. he may have a Writ of Right *de Advocatione medietatis*, and either Incumbent may have a *Juris utrum* against the other. *Medietas Advocationis* is when an Advowson descends to two Parceners, and they agree to present by Turns; in which Case either of them in her Turn, if disturbed, may have a *quare Impedit, &c. præsentare ad Ecclesiam*; but if either of them bring a Writ of Right, it must be, *de medietate Advocationis*. As there may be two several Parsons of one Church, so two Men may make but one Parson.

One can't have a larger or greater Estate than a Fee-Simple, whether it be absolute or qualify'd; and there cannot be two Fees Simple of the same Land in the same Person. If the K.'s Donee be attainted of Treason, or convey the Land to K. both the Fees are consolidated into one; and yet there may be a Fee-Simple qualified in one Person, and a Reversion in Fee in another by Act of Law, as where the Lord enters on his Villein, being a Donee in Tail, the Reversion in Fee continues in the Donor; but one Fee can't depend on another by the Act of the Party, therefore a Remainder limited on a base Fee is void.

Purchase, in Latin *Acquisitum* or *Perquisitum*, is the Possession of Tenements which one has by his own Deed or Agreement, and not by Descent; it is always intended to be by Title, and most properly by Conveyance, whether made freely without any Consideration, or for Money, *&c.* But those

thoſe that claim merely by Act of Law, as Lord by Eſcheat, Tenant in Dower, or by Courteſy, cannot be ſaid to be Purchaſers.

If a Monument, *&c.* ſet up in a Church in Honour of my Anceſtor, is defaced by the Parſon, or any other, I may have an Action on the Caſe againſt him; and ſome ſay, that the Wife or Executors that ſet it up may have an Action. By Cuſtom the Heir may have ſome Chattels, as Heir-Loom, (as the beſt Bed, Table, *&c.*) and ſhall ſue for them only at Common Law. The ancient Jewels of the Crown are Heir-Looms, and not deviſable.

Of FEE-TAIL.

THoſe Inheritances which are made Eſtates Tail by *W.* 2. were Fees-Simple conditional at Common Law, and are ſtill deſcendible in the ſame Manner as before; the Donee having Iſſue inheritable alive, was before the ſaid Statute eſteemed to have performed the Condition to three Purpoſes. 1. To alien the Land. 2. To Forfeit. 3. To charge it. But if he had died without Alienation, the Land ſhould not have deſcended to any collateral Heir, *viz.* to one not within the Form of the Gift; and if the Iſſue had died before the Donee had alien'd, he having no Iſſue at the time of the Alienation, could not bar the Donor of his Reverter on Failure of Iſſue, but he might bar the Iſſue born after, becauſe he claim'd a Fee-Simple *as Heir*. A Feme Donee might with her Husband, by levying a 19.

Fine, bar the Iſſue; but if they had alien'd without Fine, the Iſſue ſhould have had *Formedon in Deſcender*. Theſe Rules held to the King, whether he were Donor Donee, but he could never be barr'd of his Poſſibility of Reverter by Alienation with Warranty, before Iſſue had, without Aſſets.

W. 2. has ſo appropriated the Land to Tenant in Tail, and the Heirs of his Body, that if Land be given to a Man, and the Heirs of his Body, to the Uſe of another and his Heirs, the Limitation of the Uſe is void.

Tenant in T. is either in T. general, or ſpecial: Tenant in T. general, is where Land is given to one and the Heirs of his Body.

Tenement, which is the only Word uſed
20. in *W.* 2. includes not only Land, but Things iſſuing out of, concerning or annex'd to Land, or exerciſable in a certain Place, as Rents, Eſtovers, Uſes, Charters, Names of Dignity, as Duke, *&c.* of ſuch a Place, Advowſons, local Offices, as of the Marſhal of *England*, Chamberlain of the Exchequer, *&c.* And as Tenant in T. cannot bar his Iſſue by his Alienation of the Land it ſelf, ſo neither can he bar him of a Warranty annex'd to ſuch Eſtate, or of a Writ of Error, or Attaint.

But Things meerly Perſonal, as Annuities, the Office of a Faulconer, and ſuch like, can't be entail'd.

The word Heirs is abſolutely neceſſary in all Gifts in Tail, therefore a Gift to one and *Semini ſuo*, or *exitibus*, or *prolibus de Corpore*

rpore ſuo, give him but an Eſtate L. but e word Heirs may be ſupplied by Refe- nce, as where Land is given to *A.* and the eirs of his Body, Rem'r to *B. in forma redictâ:* If a Leaſe L. is made to *A.* em'r in T. to *B.* Rem'r to *C. in formâ Præ- dictâ*, the Remainder to *C.* is void for the ncertainty; but if it had been limited to im *in eadem forma*, it had been good, for *em ſemper refertur proximo antecedenti.* he words *de Corpore ſuo* may be ſupplied y others Tantamount, as *de ſe*, or *Carne ſua.* ome ſay that a Gift to the Grandfather, nd his Heirs begotten by the Father, is ood, and that the Grandfather's Wife is owable.

Tenant in ſpecial T. is when Land is gi- en to two, and the Heirs of their two Bo- ies, in which Caſe they have an Inheri- nce immediately, tho' they be both un- arried, or marry'd to different Perſons. has been ſaid, that if Land be given to . and the Heirs of his Body, *habendum* to im and his Heirs, that he ſhall have a 21. tate T. with the Fee expectant, *for other- iſe the* Habendum *would be void*; and it ems that the Law is the ſame, where the Land given to one and his Heirs, *habendum* to im and the Heirs of his Body, *for the Fee- imple given in the Premiſſes by the word Heirs all not be taken away by the* Habendum, *un- ſs the expreſs Purport thereof enforces ſuch onſtruction*; as when Land is given to *A.* nd his Heirs, *Habendum* to him and his Heirs, f he have Heirs of his Body, and if he die ithout Heirs of his Body, that it ſhall re-

vert. If a Man make to another two Deeds of one Acre, and by the one give it in T. by the other in Fee, and make Livery according to both, it is ſaid that it ſhall enure by Moieties, *i. e.* to paſs a State T. in the one Moiety, with a Fee Expectant, and a Fee-Simple in the other.

A Gift of Land to *A. habendum in liberum Maritagium cum B.* gives them both a State in ſpecial T. whether *B.* be a Man or Woman, ſo that he be of the Blood of the Donor, and notwithſtanding *B.* is not named before the *Habendum*, and the Gift is not made expreſly to *B.* but to the other *Habendum cum B.* yet it gives *B.* an immediate Inheritance; but the Donee, that is the Cauſe of the Gift, muſt (if the Thing given lie in Tenure,) hold of his Donor; therefore upon ſuch Gift, if the Rem'r in Fee be limited to a Stranger, the Donees have a State L. only, becauſe there is no Reverſion in the Donor, and conſequently no Tenure of him; and for this Cauſe, ſuch Eſtate cannot be made by Will, nor could it be made by *Ceſtuyque* Uſe before the 27th of *H.* 8. And the Donees muſt hold by Fealty only; therefore a Rent reſerved on ſuch a Gift is void, till after the fourth Degree, *for a Reſervation or Proviſo repugnant to the Eſtate which they would reſtrain are void; but in the Caſe above, the Rem'r limited on ſuch Gift is good, for it paſſes with the Livery of Seiſin, and ſhall not revert to the Donor againſt his own Grant.* If K. give Land in ſpecial T. the Survivor ſhall be Tenant in Tail, *Apres, &c.* But if K. make a Gift in Frank-

rank-marriage, and the Donee that was he Cauſe of the Gift die without Iſſue, the Man ſhall not hold it for his Life, as he ould have done, if the Gift were made y a Subject. Donees in ſpecial T. being ivorc'd *cauſa Præcontractus*, both ſhall old the Land for their Lives; but Donees 22. n Frank-Marriage being ſo devorc'd, the Donee only that was the Cauſe of the Gift hall have it; *for in the firſt Caſe, the Inheri-ance, which includes a State L. was indiffe-ently given to both; in the ſecond the Gift is ade to the Stranger only in Reſpect of his Al-iance to the Donor by the Marriage, which by uch Divorce is declared void.* If Donees in ſpecial T. die, *&c.* their Iſſue being under 14, the Couſin of either, who can firſt get the Cuſtody of him, ſhall be his Guardian in Socage; but the Couſins of the Donee in Frank-marriage, that was the Cauſe of the Gift, ſhall alone be Guardians in Socage of the Iſſue.

Talliare eſt ad quandam certitudinem ponere, the moſt reſtrain'd State-Tail is that to one and his Wife, and one Heir of their Bodies, and to one of the Body of that Heir: *But (a) Q. If ſuch Heir may not be rather ſaid to take by Way of Remainder than Deſcent.* (a) Pl. C. 291.

If one make a Gift in T. without ſaying any more, the Reverſion of the Fee-Simple is in the Donor by Conſtruction of *W.* 2. A Reverſion is when the Reſidue of the Eſtate remains in him that made the particular Eſtate. *A.* ſeiſed in Fee makes a Feoffment to the Uſe of *B.* for Life, of *C.* in T.

Remainder to his own Right Heirs, the Remainder is void, for the Feoffor has an Uſe for his L. by Conſtruction of Law; *becauſe, if the particular Eſtates determine during his Life, it muſt revert to him again,* and conſequently the Fee-Simple is alſo in him, for whenever the Anceſtor takes a State L. and afterwards in the ſame Conveyance there is a Limitation to his Heirs, the Fee veſts in the Anceſtor, *nor can a Man put the Fee in Abeiance by a Limitation to his own Heirs, as he may by a Limitation to another's Heirs, becauſe his own Heirs are as it were included in himſelf while he lives, and after his Death take only as coming in his Stead, and repreſenting him.* For which Cauſe, if a Man make a Gift in T. or Leaſe L. the Remainder to his own right Heirs, or to the Heirs Male of his Body, theſe Remainders are void; but if one make a Feoffment to the Uſe of himſelf for L. Rem'r to the Uſe of the Heirs Male of his Body, this is a good State T. executed in himſelf, *for the Feoffees muſt be ſeiſed to ſuch Uſes as the Feoffor directs, who may limit them to himſelf as well as to a Stranger,* and the Statute executes the Poſſeſſion to *ceſtuyque* Uſe in the ſame Plight, Quality and Degree in which he took the Uſe. *And therefore,* if *A.* infeoff *B.* to the Uſe of himſelf in T. Rem'r to the Uſe of *B.* in Fee, in which Caſe the Eſtate of *A.* is executed by the Statute, and that of *B.* is good at Common Law, yet the Eſtate veſts in *B.* as a Remainder, *for he takes the Uſe by Way of Remainder.*

In

In all Caſes where one makes a Feoffment without valuable Conſideration to divers particular Uſes, ſo much of the Uſe as he diſpoſes not of, remains in him as his ancient Uſe, and the Lord by Kt.'s Service, of whom Part of the Lands contained in the Feoffment was holden, that had the Priority of others before, hath it ſtill; and the Heir of the Part of the Mother, or by Cuſtom of *Burgh Eng'*, or Gavelkind, ſhall inherit, as if no ſuch Feoffment had been made. 23.

At Law, if one made a Feoffment without any Reſervation, the Feoffee held of the Feoffor by the ſame Services by which the Feoffor held over; *for it would be hard to make the Feoffor and his Heirs for ever, liable to perform the Services to the Lord Paramount, and to give him nothing in the Land wherewith to diſcharge them:* And the ſame Conſtruction has been made as to Donor and Donee ſince *W.* 2. but Leſſee L. or Y. ſhall hold by Fealty only, if nothing be reſerved. If Tenant by Grand Serjeanty had made a Gift in T. *before* 12 *Ca.* 2. 24. without any Reſervation, the Donee ſhould have holden by Kt.'s Service; but the Donor might have reſerved a Tenure in Socage, for a ſpecial Reſervation excludes the Tenure created by Law. If a Huſband ſeiſed of Kt.'s Service Land in Right of his Wife, had made a Gift in T. the Donee ſhould have holden of him by Fealty only, becauſe the Huſband's Rev'n was wrongful, *and gain'd by Diſcontinuance of the Wife's Eſtate, and the Woman was Tenant in Right to the Lord.*

C[illegible] *A.* holds

A. holds B. Acre by 4 *d.* and W. Acre by 12 *d.* and makes a Gift in T. of both, he has but one Rev'n, and yet ſhall make ſeveral Avowries in reſpect of the ſeveral Tenures over. If a *Meſne* hold of his Lord by 12 *d.* and the Tenant hold of the *Meſne* by 4 *d.* and make a Gift in T. and die without Heir, the Donee ſhall hold of the *Meſne* by 12 *d.* by the ſame Conſtruction of Law by which he held of the Tenant by 4 *d.* before.

But Donee in Frank-marriage holds by Fealty only till the fourth Degree is paſt, and afterwards by the Services by which the Donor holds; for then their Iſſues by *Ecc.* Law may intermarry. A Degree of Conſanguinity is cauſed by the Addition of one Perſon to another, in the Line aſcending or deſcending. *Civilians* computing what
24. Degree of Kin two Perſons ſtand in, begin with one and aſcend to the common Anceſtor, and then deſcend to the other; the Canoniſts deſcend from the Common Stock till they come to each, and in the ſame Degree in which they are diſtant from the common Stock, they reckon them diſtant from one another; if one be farther removed than the other, they reckon them both in the more remote Degree. So it appears that the *Civilians* put them in the ſecond Degree, whom the Canoniſts put in the Firſt, *&c.* In computing Degrees in this Caſe of Frank mariage, the Donor and Donees make the Firſt. We compute by the Canon Law.

Many

Many Caſes, tho' out of the Letter of *W.* 2. yet being in the ſame Miſcheif, are taken by the Equity of it; for Equity *in paribus rationibus paria jura deſiderat, & eſt perfecta quædam ratio, quæ jus ſcriptum interpretatur & emendat.* Therefore Gifts in T. Male or Female are within the Statute, by Force of which Gifts the Heirs of one Sex only ſhall inherit; but a Female can't purchaſe by the Name of Heir Female, unleſs ſhe be abſolutely Heir; as if Land be given to *A.* for L. the Rem'r to the Heirs Females of *B.* and *B.* have Iſſue a Son and a Daughter, and die, the Daughter cannot take the Rem'r, becauſe ſhe is not Heir, *and tho' W.* 2. *ſecured an Eſtate T. when veſted in the Donee, from being alien'd, yet it altered not the Rules of Common Law, concerning Names by which ſuch Eſtate may be purchaſed.*

Thoſe that inherit by Force of a Gift in T. Male, (whether ſuch Eſtate be made by Act executed, or by Deviſe,) muſt convey the Deſcent to themſelves wholly by Heirs Male; ſo *è converſo*, where a Gift is made in T. Female; but the Son of a Female may have an Appeal for the Death of his Anceſtor, tho' the Mother could not have it; ſo may the Uncle being Heir on the Part of the Mother, for *Magna Charta* 34. only diſables Women from bringing an Appeal as Heirs, and extends not to their Iſſue: *Sed Q.* If Land be given in T. Male, Rem'r in T. Female, and Donee have Iſſue a Daughter, who hath Iſſue a Son, this Son is not inheritable to either Eſtate T. therefore 25.

fore it is ſafeſt to limit the Rem'r in T. general. But if *A* have Iſſue a Son, who hath Iſſue a Daughter, and *A.* and the Son die, and a Rem'r is limited to the Heirs Females of *A.* the Daughter ſhall take the Rem'r as a Purchaſer. A Rem'r in T. is given to *B.*'s next Heir Male, he has Iſſue two Daughters, they have Iſſue two Sons, the Father and Daughters die, ſome ſay that neither of the Sons take, for the Uncertainty; ſome ſay that the Son of the Eldeſt only, becauſe worthieſt; others that both, for they make but one Heir.

A Gift to the Husband of *A.* and the Wife of *B.* and the Heirs of their two Bodies, gives 'em a State in ſpecial T. preſently. A Gift to two Husbands and their Wives, and the Heirs of their Bodies, gives them a joint Eſtate for L. and ſeveral Inheritances in ſpecial T. *viz.* to the one Husband and his Wife in the one Moiety, and the other Husband and his Wife in the other Moiety: *Which is the moſt natural Conſtruction.* But a Gift to two Men and one Woman, and the Heirs of their Bodies, gives each of the three a joint Eſtate for L. and ſeveral Inheritances, for they can't have one entire Inheritance, becauſe there cannot be one Heir of the Body of all three.

26. A Gift to a Man and his Wife, and to the Heirs of the Body of the Husband begotten, makes him Tenant in general T. her Ten't L. A Gift to Husband and Wife, and to the Heirs of the Husband that he ſhall beget on her Body, gives him ſpec. T. her a State L. ſo *è converſo*, when

Land

Land is given to them Two, and the Heirs of the Body of the Wife in general, or to the Heirs of her Body begotten by the Man. But a Gift to them two, and the Heirs that he ſhall beget on her, gives them both a ſpecial T. for the Word Heirs, which alone is operative, is limited to one no more than the other. A Gift to them two, and the Heirs of the Body of the Survivor, creates T. general, but it ſhall not veſt, till there be a Survivor. A Gift to one and the Heirs of his Body, is as good as a Gift to him and his Heirs of his Body. A Gift to *A.* and his Heirs on *B.*'s Body begotten, gives *A.* a ſpecial T. *B.* nothing, and tho' tis not ſaid who ſhall beget them, yet it muſt be intended that they are to be begotten by the Donee.

A. has Iſſue *B.* and dies, a Gift is made to *B.* and to the Heirs of the Body of his Father; this is a good Entail, for Heirs of the Body of his Father, is a good Name of Purchaſe. A Gift to *Maud*, and to the Heirs of her deceaſed Husband on her Body begotten, (ſhe having a Son and a Daughter by him,) gives her a State for L. and the Son a State in T. and if the Son die without Iſſue, his Siſter ſhall recover *per formam Doni*, and name herſelf Siſter and Heir to him in the Writ, becauſe ſhe can have no other, and yet the Land did not properly deſcend from him; but ſhe takes as he himſelf did, as Heir of the Body of *A.* But in the ſame Caſe, if the Heirs of the Body of the Husband had been named after the *Habend.* they had taken nothing;

for

for they could not take a preſent Eſtate in Poſſeſſion, becauſe not named before the Habend. *nor by Way of a Rem'r, becauſe there is no Mention of any Eſtate, but only of ſuch which is to take Effect preſently.* One Parcener in Fee gives her Part to her Siſter, and to the Heirs of the Body of her Father, the Donee has a State T. in the one Moiety of her Siſter's Part, and an Eſtate for L. in the other, for ſhe cannot take an Inheritance in the Whole, by the Name of Heir of the Body of the Father,
27. becauſe ſhe is his Heir but in Part. A Giſt to *A.* and his Heirs of the Body of his Father gives him a Fee, *for the Deed expreſly gives the Land to him and his Heirs; but this cannot be a State in T. for thoſe that inherit ſuch Eſtate, muſt claim it as Heirs of the Body of him from whom they claim as Heirs, therefore it muſt be a Fee.*

A Gift to *A.* and his Heirs Males, creates a Fee-ſimple, for 'tis not limited from what Body the Heir muſt Iſſue, which to make a State T. is neceſſary to be done by expreſs Words, or others equipollent.

Such Words in a Will give a State in T. Male; but K.'s Grant with ſuch Words is void, for the King is decieved; and the Parliament alone can make a new State of Inheritance. But Arms, in which one has a Fee, deſcend to the Heirs Males only; for they only are able to bear them: But the Females may in a Lozenge, or under a Curtain, expreſs of what Family they are by the Arms belonging to it, and the Huſband may quarter them with his own. The

Dutchy

Dutchy of *Lancaſter* was entailed to *Ed.* 4. and his Heirs, Kings of *England*; *Hen.* 6. granted to *J. T.* that he and his Heirs, Lords of the Manor of *Liſle*, *ex nunc Dom. & Barones de Liſle*, *Nobiles & Proceres Regni habeantur*; by this *J. T.* had a qualified Fee in the Dignity; *ſo where* a Grant was made to *A.* and his Heirs, Lords of the Manor of *D.* In Gift of Gavelkind Land to *A.* and his eldeſt Heirs, or of other Lands to *A.* and the eldeſt Heirs Females of his Body, the Law rejects the word Eldeſt.

Of Ten't in Tail after Poſſibility of Iſſue extinct.

WHen Land is given to Husband and Wife in ſpecial T. and one of them dies without Iſſue; or if they have Iſſue, and one of them die, and then the Iſſue die without Iſſue, ſo that no Iſſue be alive which can inherit by Force of the T. the ſurviving Donee is Tenant in T. *Apres, &c.* ſo when a Gift is made to a Man and his Heirs which he ſhall beget on the Body of his Wife, and ſhe dies without Iſſue, the Husband becomes Ten't in T. *Apres, &c.*

Such Ten't has 8 Qualities, that Ten't L. has not. 1. He ſhall be diſpuniſhable for Waſte. 2. Not compellable to attorn. 3. He ſhall not have Aid of him in Rev'n. 4. On his Alienation no *conſimili Caſu* lies. 5. After his Death, no Writ of Intruſion. 6. He may join the Miſe in a Writ of Right

in

in a ſpecial Manner. 7. In a *Præcipe* by him, he ſhall not name himſelf Ten't L. 8. In a *Præcipe* againſt him, he ſhall not be named barely Ten't L. But none of theſe Privileges can be transferred to his Aſſignee.

28. In four Reſpects his Eſtate has the ſame Qualities with a State L. 1. It may be forfeited by a Feoffment, *&c.* made by him. 2. It may be drowned by a State of Inheritance deſcending on him. 3. It may be exchanged with a State L. 4. He in Rev'n or Rem'r ſhall be received on Default of ſuch Ten't.

While both Donees are alive, tho' never ſo old, they can't be Ten'ts in T. *Apres, &c.*

Vid. Cro. 315. 2 Saund. 383, 387. Land is given to *A.* and his Wife for their L. the Rem'r to the firſt Iſſue Male in T. Rem'r to them in T. they having no Iſſue Male at the Time, are Ten'ts in ſpecial T. executed, *for ſince the Rem'r limited to the Iſſue Male, can't be in* Eſſe *before his Birth, there is nothing to divide their Eſtate L. from the Inheritance, which for the Time drowns the Eſtate L.* The Birth of a Son makes them Ten'ts L. the Rem'r to the Son in T. the Rem'r to them in ſpecial T. But if the Husband die, having no other Iſſue, and then the Son die, the Wife ſhall have the Privileges of Ten't in *T. Apres, &c. in Reſpect of her Rem'r of ſuch Eſtate, but ſhe ſtill continues Ten't L. for ſuch Rem'r cannot drown the State L. which is as great an Eſtate.*

When Land is given to Husband and Wife

Wife in ſpecial T. and then they are divorced, *cauſa Præcontractus* or *Conſanguinitatis*, they become bare Ten'ts L. for the Act of God alone, *viz.* dying without Iſſue, can make Ten't in T. *Apres.*

If Land be given to *A.* and his Wife, and to the Heirs of the Body of *A.* Rem'r to them both in ſpecial T. ſuch Rem'r is void, for it can't take Effect till *A.* dies without Iſſue; and when he does, it is impoſſible that he ſhould have any Heir of the Body of himſelf and his Wife. Dar.

Of Ten't by Curteſy.

IF a Man marry a Woman ſeiſed of a State of Inheritance, and have Iſſue of her born alive, which poſſibly might inherit as Heir to her of ſuch Eſtate, he ſhall hold the Land by Curteſy of *England* during his Life. 29.

The Wife muſt be actually ſeiſed, but if actual Seiſin cannot be had, Seiſin in Law is ſufficient; as if the Wife ſeiſed of Rent, or of an Advowſon, die before the Rent becomes due, or the Church void, the Huſband ſhall be Ten't by Curteſy: So if the Wife be ſeiſed of a Seigniory ſuſpended for Years only, but not if it were ſuſpended for a State of Freehold; but in all Caſes ſhe muſt have an Inheritance, and tho' her State being in T. determine for want of Iſſue, yet he ſhall be Ten't by Curteſy. But if a Woman make a Gift in T. reſerving a Rent to her and her Heirs, take Husband and have Iſſue, and Donee die without Iſſue, Vid. Supra 23.

ſue, and Wife alſo die, he can't be Ten't by Curteſy of this Rent. *For the State T. being determined, the Rent reſerved upon it muſt of Conſequence fail.* But he ſhall be Ten't by Curteſy of a Rent granted in T. to his Wife by one that has a Fee in it, tho' the Wife die without Iſſue, becauſe the Rent remains. One can't have a Right, Title, Uſe, Rev'n or Rem'r expectant on a Freehold, as Ten't by Curteſy, or Dower. A Woman Ten't in T. makes a Feoffment, and takes back a State in Fee, marries and dies, the Iſſue in a *Formedon* ſhall recover againſt the Husband, by Force of the State T. *and conſequently defeat his Title of being Ten't by Curteſy, which depending on the Eſtate whereof the Wife was ſeiſed during the Coverture, muſt fail when that is defeated.*

The Iſſue which ſhall entitle a Man to be Ten't by Curteſy muſt be born in the Life of the Wife, therefore it is not enough that it be rip'd out of her Womb after her Death, and it muſt be born alive, which may be proved by Motion, *&c.* as well as by Crying, and it muſt have humane Shape. But it is not requiſite that the Iſſue be alive when the Land deſcends or comes to the Woman: For if ſhe be diſs'ed, have Iſſue and die, the Husband ſhall enter; ſo if the Iſſue be born and die before
30. the Land deſcends to the Wife. By the Cuſtom of Gavelkind, one may be Ten't by Curteſy without having any Iſſue.

After Iſſue had, the Husband is called Ten't by Curteſy initiate, and he alone, without

without his Wife, shall do and receive Homage, and is sole Ten't to the Lord's Avowry, and if he make a Feoffment, his Feoffee shall hold during his Life, for such Feoffment cannot be a Forfeiture, because the Feoffor was seised of the Inheritance; but if he enter for Breach of a Condition annexed to such Feoffment, and the Wife die, he shall not be Ten't by Curtesy; for his Title to the Ten'cy by Curtesy was extinct by the Feoffment; as when the Lord diss'es his Ten't, and makes such Feoffment, this *is a Release in Law, and* shall extinguish the Seigniory *as much as a Release in Deed*, and the Re-entry shall not revive it, for the Condition was annexed to the Feoffment, and not to the Release, *and the Re-entry for Breach of the Condition shall not receive such Things as were absolutely destroyed by the Feoffment.* If one marry the K.s Niese by Licence, he shall be Ten't by Curtesy of Land descended to her, for she is infranchised during the Coverture. But the K.'s Villein's Wife shall not be endowed, for he still remains the K.'s Villein. If Land descend to a Wife that is an Ideot, yet on Office found the K. shall have the Custody of the Land, and after the Wife's Death, the Husband shall not be Ten't by Curtesy. *Sed Q. for the Fee and Freehold were in the Wife, and the Wife of an Ideot shall have Dower.* But one may be Ten't by Curtesy of a Castle built for the Defence of the Realm, or of a House, that is Cas[illegible] out Baronie, or of a Common *sans Nom-*

bre,

bre, tho' a Woman ſhall not be endowed of ſuch Things.

The Ten'cy by Curteſy is conſummate by the Wife's Death.

Of Ten't in Dower.

31. WHere a Man is ſeiſed of ſuch an Inheritance, that the Iſſue, which he may have by his Wife, may by any Poſſibility inherit, as Heir to her of ſuch Eſtate, ſhe ſhall be endow'd of the third Part in Severalty, if ſhe be paſt the Age of 9 Years at his Death, whether ſhe had Iſſue by him or not.

Ten't in Dower is much favour'd in Law: She ſhall be free from Toll; nor ſhall ſhe be diſtreined for Debt due to K. by her Husband.

The Wife of an Alien, or one attainted of Treaſon, or K.'s Villain, ſhall not have Dower. But the Wife of an Ideot, one attainted of *Præmunire* or Hereſy, or of a common Perſon's Villein, ſhall be endowed. So ſhall a Niefe being married to a Freeman, and the Wife of one attainted of Felony by the 1ſt of *E. 6 ca. 6.* and 5th of *E. 6 cap.* 11. The Husband's Seiſin in Law is ſufficient to give the Wife Title of Dower.

The Rule, *Dos de dote peti non debet*, is thus to be underſtood, where the Grandfather dies ſeiſed of 3 Acres, and the Father enters and endows the Grandfather's Wife of one Acre, and dies, the Father's Wife ſhall be endowed only of the 3d Part of the

the other two Acres; for inaſmuch as the Grandfather died ſeiſed, in Judgment of Law there was no Meſne Seiſin betwixt him and his Wife: But if the Father had claimed the ſaid 3 Acres by Purchaſe from the Grandfather, his Wife ſhould, after the Death of the Grandfather's Wife, have been endowed of the 3d Part of that Acre, whereof the Grandfather's Wife was endowed; or in the firſt Caſe, if the Son, after the Death of Grandfather and Father, had endow'd his Mother firſt, and then the Grandmother had recovered a 3d Part againſt her, the Mother after her Death might have enter'd again; for her Eſtate in the Part ſo recover'd, was defeated only for the Grandmother's Life.

The Husband's Seiſin for an Inſtant only, gives the Wife no Title of Dower, as the Seiſin of *Ceſtuyque* Uſe before the 27th of *H.* 8. making a Feoffment; or of the Conuſee of a Fine that grants and renders to the Conuſor.

If Husband exchange Land, ſhe may chuſe to be endowed either of the Land given or taken in Exchange.

She ſhall not be endowed of a Caſtle for the Defence of a Realm, nor of a Houſe that is *Caput Baroniæ* or *Comitatus. This is to be underſtood of Baronies by Tenure, which are now extinct, and were anciently Caſtles of Defence.* 3 Lev. 401.

If Ten't T. make a Feoffment, and take back a State in T. and marry, and die, the Iſſue is remitted, and the Wife not Dowable. But if ſhe demand Dower, the Ten't muſt

must not plead *nunques Seiſie que* Dower, but the ſpecial Matter.

An Alien, or Infidel is not dowable, except the Queen, being an Alien; and it was adjudged that the Wife of *Edmond*, *Ed.* the Firſt's Brother, tho' ſhe was an Alien, ſhould be endowed of the 3d Part of his Lands in Fee.

32. Of Things entire ſhe ſhall be endow'd in a ſpecial Manner; for Example, ſhe ſhall have the 3d Toll-Diſh of a Mill, the 3d Day's Work of a Villein, the 3d Part of the Profits of a Fair, or the Profits of the Office of Gaoler, the 3d Fiſh taken in a Piſcary, the 3d Preſentation, every 3d Tithe Sheaf, *&c.* for what ſhe ſhall have muſt be aſcertain'd, and ſhe ſhall not be endowed of a 3d Part in common with the Heir.

She ſhall not be endowed of Rent reſerved on a Leaſe L. but of a Rent reſerved on a Gift T. ſhe ſhall, for ſuch Rent is an Inheritance: If Leſſor Y. marry, and die, the Wife ſhall have the 3d Part of the Rent reſerved, and of the (*a*) Rev'n.

(*a*) Vid. Br. Dower 89. Cro. El. 564.

She ſhall not have Dower of common *ſans Nombre en gros*, nor of an Annuity, nor of Rent whereof the Freehold was ſuſpended before, and during the Coverture: But ſhe ſhall be endow'd of Rent extinguiſh'd by the Husband's Releaſe after the Coverture.

Tho' the Heir improve or impair the Value of the Land, ſhe ſhall have her 3d Part according to the Value at the Time of the Aſſignment.

Sponte (a) *virum Mulier fugiens, & adultera* (*facta*, (a) W. 2. 34.
Dote ſua careat, niſi ſponſi ſponte retracta.

Divorce *à Vinculo* bars Dower, Divorce *à Menſa & Thoro* only does not.

A Wife endow'd by Metes and Bounds, according to common Right, ſhall avoid all Charges made after her Title; one endowed againſt common Right ſhall not: But the Wife of Ten't in Common, and in ſome Caſes the Wife of one Sole ſeiſed, ſhall not be endow'd by Metes and Bounds; as if Husband ſeiſed in Fee infeoff 8 Perſons, and die, and the Wife bring a Writ of Dower againſt them all, and two of them confeſs the Action, and the other ſix deſcend to Iſſue, ſhe ſhall recover the third Part of two Parts of the Land in 8 Parts to be divided, and when ſhe has Judgment againſt the other ſix, ſhe ſhall have a Third of ſix Parts of the ſame Land in eight Parts to be divided.

She can't enter into her Dower before 'tis aſſigned to her. *Magna Charta* gave her Forty Days, Old Law gave her a Year to continue in her Husband's Houſe after his Death, but ſhe loſt both by marrying again.

The Statute of *Merton* gives her Damages from the Death of her Husband; but they ſhall be recovered only in Writ of Dower, *unde nihil habet*; not in Writ of Right of Dower, for Damages are not recoverable in any Writ of Right; nor in Writ of Dower *ad Oſtium Eccleſiæ, &c.* becauſe

becauſe ſhe may enter into ſuch Dower without Suit: The Husband alſo muſt die ſeiſed of the Freehold and Inheritance; and ſhe muſt not delay herſelf: She muſt be able to prove a Demand of the Dower, for *tout Temps Priſt* is a good Plea for the Heir, to bar her of the *Meſne* Profits, but 'tis no Plea in a Writ of *Aiel*, *&c.* for there the Ten't has no Title, and holds merely by Wrong. *Note* the Caſe where the Tenant pleaded as to Part *non Tenure*, and as to Part Detainment of Charters, and both theſe Iſſues being found againſt him, the Demandant recovered the Value from the Husband's Death, tho' the Jury found further, that the Demandant with her Son had taken the Profits for 6 Years of the Time, therefore beware of falſe Pleas:

1 Sid. 252. 1 Lev. 163. *And Note, that Pleas in Abatement being found againſt him that pleads them, are peremptory againſt him.* This Statute extends to Dower of Copyholds, but Damages are not given where Dower is aſſign'd in Chancery, nor where the Heir or Feoffee aſſign Dower; for ſhe muſt recover by Plea, and not be able to recover without it. Husband ſeiſed in Fee grants a Rent, makes a Feoffment, takes back a State T. and dies, ſhe ſurmiſing that he died ſeiſed, prays her Damages, ſhe ſhall hold the Land charg'd, for by her Prayer, ſhe accepts herſelf Dowable of the 2d Eſtate.

Let the Husband be never ſo young, yet if ſhe be paſt the Age of 9 Years at his Death, ſhe ſhall be endowed, tho' he alien'd the Land before ſhe came to that

Age, for the Poſſibility which the Law gives her of having Title of Dower, if ſhe arrive at that Age, ſhall not be defeated by the Act of the Husband. And if he alien his Lands, and then ſhe be diſabled by Attainder and pardoned, ſhe ſhall have Dower. *For tho' the Title of Dower be not conſummate till the Husband's Death, yet by the Marriage it ſo veſted in the Wife, that no Act of the Husband can bar it, nor is it forfeited to the K. by the Attainder, and tho' ſhe be diſabled to claim it during the Attainder, yet when that is removed, ſhe may claim it as before.* But if the Husband of an Alien ſell his Lands, and then ſhe be made a Denizen, ſhe ſhall not be endow'd: *For an Alien has no more Title of Dower than if ſhe were never married at all, and the Husband's Alienation takes nothing from her which would certainly have come to her by the natural Courſe of Things, for ſhe only had a Poſſibility of gaining ſuch Title by the K.'s voluntary Act.* But in the ſame Caſe if ſhe were naturalized, ſhe ſhould have had her Dower; *becauſe thereby ſhe became a natural Subject* ab initio.

On the Iſſue, *quod nunquam fuere Legitimo Matrimonio copulati*, the Biſhop ought to certify that they were *Legitimo Matrimonio copulati*, tho' the Woman were under 12, or the Man under 14, or tho' they might have been divorced *à Vinculo*, for it was *Legitimum quoad dotem.* But it is ſaid, that ſuch Wife who might have been divorced *à Vinculo*, ſhall not have an Appeal of the Death of her Husband, *in favorem Vitæ*;

yet an Adultreſs ſhall have an
(a) W. 2. 34. Appeal, tho' ſhe ſhall not have (*a*) Dower, for the Statute that takes away the one, mentions not the other; ſo ſhall the Wife of one attainted of Treaſon, *for her Husband, tho' attainted, is ſtill her Husband.*

A Wife can't have Dower till her Huſband's natural Death.

As a Woman ſhall have a 3d Part of the Husband's Land for her Dower by Common Law, ſo by Cuſtom of ſome Places ſhe ſhall have half, or all, *&c.* She ſhall have half of Gavelkind Lands while ſhe remains Sole, and without Child; and ſuch a Cuſtom may be in upland Towns as well as Burghs, but it is ſafer to lay it in a Manor, if the Truth will bear it: And Cuſtom may abridge, as well as inlarge Dower.

Dowment *ad oſtium Eccleſiæ* is where
34. one of full Age, when he comes to the Church Door to be married, after Affiance plighted, endows his Wife of all his Land, or half, or leſs, and aſſigns the Certainty of what ſhe ſhall have. In this Caſe ſhe may enter after his Death, without other Aſſignment. Such Dowment can't be made *ad oſtium Caſtri, Meſſuagii, &c.* it muſt be made after Marriage, therefore it is good without Deed, *which a Man can't make to his Wife; and ſuch Dowments are favoured, becauſe they ſupply a neceſſary Defect of Law, by reducing the Wife's Title to a 3d of the Husband's Land to ſome known certain Part, which no general Rules can do.* Anciently ſuch Dowment was good for no

more than a 3d Part, but now it may be made for the whole.

Where the Writ demands Land, Rent, or other Things in certain, the Dem't after Judgment may enter, or diſtrain, before any Seiſin delivered by the Sheriff; but in Dower, where the Writ demands nothing in certain, the Dem't can do neither, till after Execution; and tho' the Writ demand the 3d Part of 6*d.* Rent, or the 2d Part of a Moiety; in which Caſes the Sheriff can reduce it to no more Certainty, than was before; yet he muſt deliver Execution, *that the Solemnity thereof may give the greater Strength to the Judgment ſo uncertainly delivered.*

As Dower may be aſſigned by the Sheriff in Purſuance of K.'s Writ, ſo may it be aſſigned by the Ten't of the Land by Conſent, and to make ſuch Aſſignment perfect, theſe Rules muſt be obſerved. 1. It muſt be certain. 2. Of Land whereof ſhe is Dowable, or Rent out of it, for if it be out of other Land, it is no Bar of her Dower. 3. It muſt be without Condition or Limitation. 4. It muſt be made by ſome Ten't of the Land. If a Jointenant aſſign to the Wife a 3d Part of the Land for her Dower, this ſhall bind his Companions; and ſuch Aſſignment by a Diſs'or ſhall bind the Diſs'ee; but if they aſſign a Rent it ſhall bind themſelves only, for they were not compellable thereunto. A Man enfeoffs ſeveral with Warranty, his Heir endows the Wife of Parcel of Land in full Satisfaction of all the Dower, which ſhe ought to 35.

have in the Land of all the Feoffees; if she bring her Writ of Dower against the Feoffees, the Heir coming in as Vouchee may plead this Assignment in Bar; but one Feoffee can't plead such Assignment made by another, for a Man can take no Benefit of an Act done between Strangers; but in the first Case, the Heir is bound by the Warranty of his Ancestor, to secure the Land to the Feoffees. If a Woman recover Dower against a Diss'or coming to the Land by Covin, to which she was Privy, the Diss'ee shall avoid it; so if Diss'or's Endowment be prejudicial to the Diss'ee, as when the elder Son disseises the younger, who was infeoffed by the Father with Warranty, and endows the Wife, the younger Son shall avoid it, for else he should lose his Warranty, *by Force whereof if he be in Possession, and the Wife demand Dower against him, he shall recover in Value against his elder Brother.* Assignment by Guardian in Socage is void, but Assignment by Guardian in Chivalry was good, for a Writ of Dower lay against him: The Heir himself, before the Entry of Guardian in Chivalry, might assign it.

Dowment *ex assensu Patris* is when the Father is seised, and his Son and Heir apparent, being marry'd, endows his Wife of a certain Parcel of his Father's Land: In this Case she may enter after the Son's Death tho' the Father be still alive, or she may have a Writ of Dower for such Dowment.

Be

But if the Father at the Time of ſuch Dowment had been ſeiſed but of a Rev'n on a Freehold, the Dowment had been void, *for if the Son himſelf had been ſeiſed thereof, he could not have endowed his Wife of it.*

It is the Son that doth endow, and the Father doth but Aſſent; but the Dowment is good, tho the Son be under Age when it is made; but he muſt be an Heir apparent, and ſuch a one as always muſt continue ſo: Therefore ſuch Dowment can't be *ex aſſenſu Fratris*, or of *Burgh Eng'*, or Gavelkind Land; but Dowment *ex aſſenſu Matris* is good. Some ſay, that if the Father be attainted after ſuch Dowment, ſhe loſes her Dower, for her Husband continues not Heir.

The Father's Aſſent to ſuch Dowment ought to be by Deed; becauſe the Land is charged thereby with a future Freehold. To Deed ten Things are neceſſary: 1. Writing. 2. Parchment or Paper. 3. A Perſon able to contract. 4. By a ſufficient Name. 5. A Perſon able to be contracted with. 6. By a ſufficient Name. 7. A Thing to be contracted for. 8. Apt Words. 9. Sealing. 10. Delivery.

To the Delivery of a Deed to the Party, 36.
Words are not neceſſary; therefore if I deliver a Deed to the Party as an Eſcrow, to be my Deed on certain Conditions, this is an abſolute Delivery of it; *for it would create the greateſt Confuſion, if the Words of a Deed intended to be framed by Advice, and executed with ſuch Solemnity, ſhould be controll'd by*

looſe Words not contained in it, the exact Form of which is ſo eaſily forgot or miſtaken. But I may deliver a Deed to a Stranger as an Eſcrow, *&c.* for the Delivery thereof to a Stranger, without Words, is of no Force, *and therefore the ſame Words, which make the Delivery effectual, may ſhew how far it ſhall be ſo.* As a Deed may be delivered to the Party without any Words, ſo may it be delivered by Words only, without any Act.

She that enters and agrees to ſuch Dower *ad oſtium Eccleſiæ*, or *ex aſſenſu*, is concluded to claim her Dower at Common Law, but ſhe may refuſe ſuch Dower, and claim her Dower at Common Law.

A Jointure was no Bar of Dower before 27 *H.* 8. 10. for her Right or Title to a Freehold can't be barr'd by Acceptance of a collateral Satisfaction. But by that Statute it is a Bar of Dower, if it be made according to the Form of it; and as to that, theſe Things are to be obſerved: 1. It muſt be by the firſt Limitation to take Effect in Poſſeſſion, (*by a Conveyance at Law,*) or in Profit, (*by Way of Uſe executed by the Statute,*) preſently after the Husband's Death. Therefore if the Limitation be to the Husband for L. after to *A.* for L. and after to the Wife for L. this can be no Jointure within the Statute, to bar Dower, tho' *A.* die during the Coverture, for *quod ab initio non valet, tractu Temporis non Convaleſcet.* 2. It muſt be an Eſtate for her L. at leaſt; *but it may be limited*
4 Rep. 3. *a.* *to continue ſo long as ſhe ſhall remain Sole, or ſhall do, or forbear to do, any Act in her own*

Power

Power. 3. It muſt be expreſſed or averred to be in Satisfaction of her whole Dower: A Will can't be averred to be in Satisfaction of her Dower, unleſs it be ſo expreſſed in the Will. 4. The Eſtate of the Land muſt be in her, not in Truſtees for her. 5. It may be made before or after Marriage; but if it be made after, the Wife may claim Dower, and waive her Jointure, tho' ſhe join'd with her Husband in levying a Fine of it. It may be limited to her alone, or jointly with her Husband.

A Jointure is not forfeited by the Husband's Attainder of Treaſon, but Dower by Common Law, or *ad oſtium Eccleſiæ*, or *ex aſſenſu*, or by Cuſtom, are barr'd by ſuch Attainder, ſo long as it ſtands in Force. 37.

A Jointure, or Dowment *ad oſtium Eccleſiæ*, or *ex aſſenſu*, made to one under the Age of 9 Years are good, becauſe they are made by Aſſent.

She that is endowed *ad oſtium Eccleſiæ*, or *ex aſſenſu*, may enter into the Land aſſigned, after her Husband's Death, without any Aſſignment. Vid. Supra.

A Woman ſhall not be endowed of Lands whereof her Husband was Jointenant, but of Land whereof he was Ten't in Common ſhe ſhall. Quia Survivor takes place. 38.

If Ten't T. endow his Wife *ad oſtium Eccleſiæ*, the Iſſue may enter upon her after his Death: And if Ten't in Fee within Age make ſuch Dowment, his Heir may enter upon her: But Dowment *ex aſſenſu Patris*

is good, tho' the Husband be within Age, the Father being then of full Age.

A Woman Guardian in Socage, bringing a Writ of Dower againſt Guardian by Knt.'s Service (*before* 12 Ca. 2. 24.) ſhould, upon his Pleading the whole Matter, have been adjudged to endow herſelf *de la pluis Beale*, *i. e.* the Faireſt of the Socage Land. But ſuch Dowment could not be without Judgment: If the Socage Land were not ſufficient for her whole Dower, ſhe ſhould retain for Part, and recover againſt the Guardian in Chivalry for the other Part. After Judgment as aforeſaid, whether in the K.'s Court, or the Lord's, the Wife ſhould, in the Preſence of her Neighbours, have endowed herſelf of the Beſt of the Land which ſhe held as Guardian in Socage, by Metes, to hold it for L.

Guardian in Chivalry was poſſeſſed of the Ward of the Body before Seiſure, but not of the Land before Entry. Writ of Dower lay againſt K.'s Grantee of a Ward; it alſo lay againſt the Executors of the Guardian; or one of them only, if he alone took the Profits. If a Man were poſſeſs'd of a Ward in his Wife's Right, the Writ of Dower lay againſt the Husband only.

39. Guardian in Chivalry could not plead Detainment of Charters in Bar of Dower, but he might plead Detainment of the Body of the Heir, becauſe the Marriage of the Heir belong'd to him. He might aſſign Dower out of the Land in Ward, or give a Rent in lieu of it. If he had aſſigned too much, the Heir at Common Law might have a Writ of *Admeaſurement*

measurement; if the Heir had assigned too much, before the Guardian entered, *W.* 2. gave the Guardian this Writ, and the Heir himself might have the same when he came to Age; some say within Age; but the Guardian's Assignee after such Endowment could not have it, because it was a Chose in Action.

This Writ also lay on an Assignment of Dower in Chancery to the Widow of K.'s Ten't in Capite. F. N. B. 149. a. 26. c.

Whenever a Wife is seised of such a State in Tenements, that the Issue which the Man has by her may possibly inherit the same as Heir to her, he shall be Ten't by Curtesy; and if the Man have Issue inheritable by her, and then she be attainted, yet the Title of being Ten't by Curtesy vested in the Husband shall not be lost thereby; but if she be attainted before Issue had, he can have no Title at all to be Ten't by Curtesy. 40.

So when the Man is seised of such an Estate in Tenements, that it may possibly happen that the Wife may have Issue by him, and that the same Issue may possibly inherit the same Estate as Heir to him, she shall have Dower, tho' the Wife be never so old, or the Husband never so young. But 2d Wife of Donee in special T. shall not be endowed; *Causa Patet.*

After *W.* 2. if the Ten't T. were attainted of Felony, the Issue should inherit, and yet the Wife lost her Dower, for she was not relieved by the Statute; and a Wife that elopes loses her Dower, by the 34th *Chap.*

of that Statute, and yet her Iſſue ſhall inherit.

The Common Law puniſh'd one attainted of Treaſon, or Felony: 1. With Loſs of Life, by Hanging. 2. Loſs of his Wife's Dower, as well againſt the Husband's Feoffee, as the Lord by Eſcheat: (but at this Day, the Husband's Attainder of Felony cauſes no Loſs of his Wife's Dower.) 3. Corruption of Blood, Loſs of Gentility, *&c.* 4. Forfeiture of Land, Goods, and Chattels. But this extends not to *Petit Larceny*, under 12 *d.*

Of Ten't for Term of Life.

TEnant L. is he to whom Tenements are let for Term of his L. or for Term of another's Life; but in common Speech, the firſt is called Ten't for Term of his Life, the 2d is called Ten't for Term of another Man's Life, if Leſſee *pur autre Vie*, or Grantee of Ten't in Dower, or by Curteſy, or of Leſſee for his own Life die, living *ceſtuique Vie*, he that firſt enters is called an Occupant and ſhould at Law hold the Land, living *ceſtuique Vie*, and be puniſh'd for Waſte, and ſubject to Payment of the Rent reſerved. But there never could be an Occupant againſt the K. nor of a Thing lying in Grant, for every Occupant muſt not only aver the Life of *ceſtuique Vie*, but muſt alſo claim by a *que* Eſtate; *but this cannot be pleaded of Things that lie in Grant; in which no Man can plead that he has the Eſtate of another, without ſhewing a Writing by which he*

claim

claims it. But the Heir of Ten't *pur autre Vie* alone ſhall have the Land, *as a ſpecial Occupant*, where the Leaſe is to a Man and his Heirs for another's Life, or where Ten't *pur autre Vie* grants over his Eſtate to another and his Heirs; *and now by* 29 Car. 2. 3. *ſuch Eſtate ſhall be chargeable in the Hands of the Heir, if it come to him by ſuch ſpecial Occupancy, as Aſſets by Deſcent; elſe it ſhall go to the Executors, and be Aſſets in their Hands.*

Leſſee L. or Y. ſhall have reaſonable Plough-bote, Hay-bote, and Houſe-bote, without Proviſion of the Party, and he may take them on the Land demiſed without any Aſſignment, unleſs he be ſpecially reſtrained.

If a Leaſe be made to a Man for his Life and the Lives of *A.* and *B.* he hath but one Freehold with ſeveral Limitations, which is higher than a Leaſe for his own Life only; but when there are ſeveral States in ſeveral Perſons, an Eſtate for one's own Life is higher than for another's. Therefore Ten't L. 42.
may ſurrender to him in Rem'r for Life, and if he inſeoft him, it enures by Way of Surrender, and is no Forfeiture. If Leſſee L. leaſe to his Leſſor for Leſſor's L. or if Feme Leſſee L. and her Husband by Indenture make a Leaſe to the Leſſor for the Huſband's Life, ſuch Leaſes can't be Forfeitures, becauſe the Leſſor is privy to them; nor Surrenders becauſe the Leſſees give not up their whole Eſtate; and if the firſt Leſſor marry, and die, during the Life of Leſſee in the firſt Caſe, or of the Husband

in

in the ſecond, his Wife ſhall not be endowed, and if a Rent be reſerv'd on ſuch Leaſe made to the Leſſor, the Reſervation is good. If a Woman recover Dower againſt the Leſſee L. of the Husband's Heir, or againſt a Widow of her Husband's Feoffee being Ten't in Dower, and die, they ſhall have the Land again. *A.* and *B.* Jointenants, *A.* for L. *B.* in Fee, join in a Leaſe, L. *A.* has a Rev'n, and ſhall join in an Action of Waſte. So if Leſſor and Leſſee L. join in ſuch Leaſe, it is ſaid they ſhall join in an Action of Waſte, and that the one ſhall recover the Place waſted, and the other the Damages.

A Leaſe made to one *durante Viduitate*, or *dum ſola fuerit*, or *quam diu ſe bene geſſerit*, or ſo long as Leſſee ſhall pay 10 *l. per Ann.* or till he be promoted to a Benefice, or for any other uncertain Time, if it be of Lands, and Livery be made, gives a State L. determinable, but if it be of Things that lie in Grant, it gives a State L. by Delivery of the Deed. And in Count, or Plea, the Leſſee ſhall alledge the Leaſe, and conclude, that by Force thereof he was ſeiſed generally for Term of his Life. If a Manor worth 20 *l. per Annum*, be let to a Man till 100 *l.* be paid, the Leſſee has a State L. if Livery be made, determinable upon the Levying of the 100 *l.* If a Rent Charge of 20 *l. per Annum* be granted till 100 *l.* be paid, the Grantee has a State for five Years, for it is certain, that then it will be paid. Yet ſome uncertain Eſtates are neither for L. Y. or W. As where Land is deviſed to Execu-

tors

ors till ſuch Debts are paid, for if this were a State L. the Debts by the Executor's Death might remain unpaid: So where Guardian by Kt.'s Service held the Heir's Land for the ſingle Value of the Marriage, (*in which Caſe he had the Land but in Nature of a Diſtreſs*;) or where ſuch Guardian held over for the double Value, or where one has Land delivered in Execution for a Debt, *which Eſtates are created by Parliament, and if they ſhould be conſtrued to be Eſtates L. they might determine before the Money, for the Satisfaction whereof they were given, could be levied.*

If a Man grant Lands, or Rev'ns, *&c.* (due Ceremonies requiſite in Law being performed,) or declare an Uſe, and limit no Eſtate, the Grantee or Leſſee has a State L. K. grants to an Officer at Will a Rent for the Exerciſe of his Office for Term of his L. the Grantee has a State in the Rent for Term of Life, determinable at Will *conſequentially, becauſe it muſt determine with the Office, but K. can't take away the Rent, unleſs he remove him from his Office.* A Leaſe L. made by Ten't in Fee, ſhall be conſtrued for L. of the Leſſee, ſuch Leaſe by Ten't T. ſhall be conſtrued for L. of the Leſſor, for if it were conſtrued to be for L. of the Leſſee, it would cauſe a Diſcontinuance, and the Law more reſpects a leſs Eſtate by Right, than a greater by Wrong.

He that has a State L. or a greater, has a Freehold, but none that has a leſs Eſtate. Feoffor is properly he that inſeoffs another in

in Fee: Donor is he that makes a Gift in T. Leſſor he that Leaſes for L. Y. or W.

Whoever is diſabled to purchaſe, is diſabled to infeoff; but Perſons attainted of Treaſon, Felony, or *Præmunire*, or guilty of ſuch Offences, if Attainders enſue, may purchaſe *(for the Benefit of others,)* but their Feoffments are voidable. An Ideot, Madman, Infant, Feme Covert, one under Dureſs, or born Deaf, Dumb, and Blind, may purchaſe, and infeoff others, but both their Purchaſes and Feoffments are voidable; an Heretick convict, Leper removed
43. by Writ, one Deaf, Dumb, or Blind, if he has Underſtanding, and can expreſs it by Signs, Villeins of any but the K. may infeoff, and their Feoffments ſhall never be avoided.

At Common Law a Man could not make a Feoffment of Parcel to hold of the Chief Lord, for he could not divide the Seigniory which was entire, and bar the Lord of his Diſtreſs for the whole Services in any Part of the Land, but he might make a Feoffment of the whole to hold of the Lord, or a Feoffment of Parcel to hold of himſelf; but ſuch Feoffment of Parcel made without the Lord's Aſſent after *Magna Charta* 32 (which provided, *quod nullus liber homo det de cætero amplius alicui de terrâ ſuâ, quam ut de reſid' terræ ſuæ poſſet ſufficienter fieri Domino feodi ſervitium ei debitum quod pertinet ad feodum illud,)* was holden to be againſt the
2 Inſt. 66. ſaid Statute, *and the Heir of the Feoffor might avoid it, unleſs the Services due to the Lord might be ſufficiently performed of the Reſidue remain-*

emaining in the Hands of the Feoffor. And by this Statute K. took a Fine of his Ten't for Alienation, and ſome ſay that he might have ſeiſed the Land as forfeited.

At this Day, by the Statute of *quia emptores*, the Ten't may alien Part to hold of the Lord, and the Feoffee ſhall hold of him *pro particula*; but this Act took not away K.'s Fine for Alienation, becauſe he was not mentioned in it: By the 1 *Ed.* 3. 12. it was provided, That the Alienation of K.'s Ten't in Chief ſhould be no Forfeiture, and that K. ſhould only have a Fine; *and by* 12 Ca. 2. 24. *all Fines for Alienations are taken away, except ſuch as are due by Cuſtom of particular Manors.*

Of Ten't for Term of Years.

TEnant Y. is he to whom a Leaſe for a certain Term of Years is made, who has entered by Force of ſuch Leaſe. 44.

By 32 *H.* 8. 28. Ten't in Tail, Husband and Wife ſeiſed jointly of a State of Inheritance, or in the Wife's Right, any Perſon ſeiſed in the Right of his Church, except Parſons or Vicars, may by Leaſe for 21 Years, or 3 Lives, bind the Iſſues in T. (but not him in Rev'n or Rem'r,) the Heirs or Succeſſors reſpectively; but theſe Things muſt be obſerved in the making of ſuch Leaſe.

1. It muſt be by Indenture.

2. It muſt, *by the Words of the Statute*, be made to begin from the Day of the making thereof, or it may be made to begin from

from the making, *by an equitable Conſtruction; but if a Leaſe L. be made to begin from the Day of the making, the* (a) Cro. Ja. 458. *(a) Livery of Seiſin muſt be made after the Day on which the Deed was delivered, for if it were made on the ſame Day, it would be void, becauſe a Freehold cannot* Yel. 131. *paſs* in Futuro, *for which Cauſe a Grant for L. of a Thing lying in Grant,* habendum a die Confectionis, *is void; but ſuch Leaſe L. of Land is good, if Livery be made after the Day on which the Deed was delivered, becauſe it takes not Effect by the Delivery of the Deed, but by Livery of Seiſin; but a Grant of Things lying in Grant muſt take Effect by the Delivery of the Deed, or not at all.*

3. If there be an old Leaſe in Being, it muſt be abſolutely ſurrender'd, or within one Year of its Expiration.

4. There muſt not be a double Leaſe in Being at the ſame Time; therefore, if one make a Leaſe Y. according to the Statute, and ouſt his Leſſee, he cannot make a Leaſe L. according to the Statute.

5. It may be for fewer Years or Lives.

6. It muſt be of Things manurable and corporeal.

7. Of Land, *&c.* moſt commonly lett to (b) Quære. Farm for (b) 20 Years next before, by ſome 1 Lev. 312. 1 Sid. 416. ſeiſed of a State of Inheritance. A Grant by Copy is a ſufficient letting to Farm within this Statute.

8. The accuſtomable yearly Rent muſt be reſerved, therefore a Leaſe of one Acre not uſually lett, together with others, com-

only lett, reſerving a Rent exceeding the former, to the Value of that Acre, is not warranted by the ſaid Statute, as to any part, becauſe the old Rent is not reſerved out of the Land accuſtomably letten, but a new Rent iſſuing entirely out of the Whole, *and where the Words of the Statute, which impower ſuch Ten'ts to make ſuch Leaſes, may be ſtrictly obſerved without any Inconvenience to the Party, they ought to be purſued.* Parceners after Partition may Leaſe the Land reſerving a Rent *pro Ratâ, for otherwiſe they could make no Leaſe, unleſs all would agree.* So Ten't T. may lett Part of the Land accuſtomably letten, reſerving Rent *pro Ratâ, for perhaps he may not be able to get a Ten't to take the Whole.* It is not neceſſary to reſerve a Heriot, or to reſerve the Rent at four Feaſts, tho' formerly the Leaſes were ſo made, for the Words of the Statute only require that the yearly Rent or more be reſerved.

9. It muſt not be without Impeachment of Waſte, therefore a Leaſe L. with a Rem'r or L. is not within this Statute.

All Conveyances whatſoever made by Eccleſiaſtical Corporations are made void by 45.
El. 19. and 13 *El.* 10. except Leaſes for 3 Lives, or 21 Years from the Time of the making, whereon the old yearly Rent, or more, is reſerved.

The ſame Rules muſt be obſerv'd in making Leaſes within the Exceptions of the ſaid Statutes, as are required in Leaſes made according

according to the 32 *H.* 8. except in two Caſes.

1. Leaſes within the Exception of thoſe Statutes muſt be made to begin from the Making, and not from the Day of the Making, *which would laſt a Day longer than the Statute allows, and if a Leaſe one Day longer be good, why not two and ſo on?*

Vide 3 Lev. 438

2. The 32 *H.* 8. does not enable the Perſons therein mentioned to make a Concurrent Leaſe, when there is an old Leaſe in Being of a Year's Continuance, but no Concurrent Leaſe is reſtrained by the 1ſt or 13th of *El.* ſo that it be made to commence from the Making; *but* 14 El. 11. *enacts, That the* 13 El. 2. *ſhall not extend to Houſes in Cities and Towns, but that the ſame may be granted as they might have been before the* 13 *El. (even in Fee, ſo that a full Recompence be made of as good Value,) and Leaſes may be made of Houſes for* 40 *Years, charging the Leſſee with Repairs,* &c. *Provided that no Leaſe be permitted to be made by Force of the ſaid Act in Rev'n, but this Act mentions only Perſons reſtrained by the* 13*th* El. *Therefore it (a) extends not to Biſhops who are reſtrained by the* 1*ſt only, and are not within the* 13*th.* 18 El. 10. *enacts, That all Leaſes by Perſons reſtrained by the* 13*th ſhall be void, whereof any former Leaſe is in Being, and not to be ſurrender'd, expired or ended within* 3 *Years after the Making of the new Leaſe. But it ſeems, that concurrent Leaſes of Houſes in Towns, which are prohibited by the*

(a) Watſ. 330.

he 14*th* El. *are* (*a*) *not made good by this Statute, for it only mentions Perſons re-rain'd by the* 13*th, but the Reſtraint hereof is wholly ſet looſe by the* 14*th* El. *as o ſuch Houſes, and the* 18*th is wholly a liſabling Statute:* And concurrent Leaſes nade by Biſhops *remain as they were be-ore the ſaid Statutes, therefore* if they are onfirmed by Dean and Chapter they are ood, *tho' there are more than* 3 *Years in Being of an old Leaſe,* but if they are not onfirmed, they muſt follow the Directions f 32 H. 8. *By* 18 El. *all Leaſes by Col-ges and collegiate Churches are void, un-ſs one* 3*d of the old Rent be reſerved in orn at the Rate of a Quarter of Wheat r every* 6 *s.* 8 *d. and a Quarter of Malt r every* 5 *s. of the old Rent.*

(*a*) Watſ. 344. Q.

Notwithſtanding 13 *El.* ſays, that all o-her Grants, *&c.* ſhall be void to all Pur-oſes; yet if they be made by a ſole Cor-oration, they ſhall be good againſt the eſſor if by a Corporation Aggregate, they hall be good ſo long as the ſame Perſon ontinues Head. Nor do the ſaid Acts ex-nd to Grants of ancient Offices of Neceſ-ty granted with the uſual Fees. *But if ey have been uſually granted for one Life ly, a Grant thereof for more Lives, or in ev'n, is not good; but if they have been ſually granted in Rev'n, they may be ſtill ſo ranted, that the Office may be always full.*

10 Rep. 6. Cro. Ca. 557.

Ten't of the Land and a Stranger join in Leaſe Y. by Indenture, this is the Leaſe f the Ten't only, and the Confirmation of he Stranger, and as to him it works only by

by Concluſion. Two ſeveral Ten'ts of ſeveral Lands join in ſuch a Leaſe, it ſhall enure as the ſeveral Leaſe and Confirmation of both, and ſhall work no Concluſion, becauſe an Intereſt paſſes from both. *B.* Leſſee for *C.*'s Life, and he in Rem'r join in ſuch Leaſe, it is the Leaſe of *B.* while *C.* lives, and after his Death, it is the Leaſe of the other, and the Confirmation of *B.* and ſo it muſt be pleaded, for if the Leſſee be ejected, and bring an Ejectment, and declare of a Leaſe by both, and upon not Guilty pleaded, it be found ſpecially, it ſhall be adjudg'd againſt him, *for tho' the Words of ſuch Deed be the joint Expreſſions of both, yet it is ſo far only the Leaſe of either of them, as the Leſſee derives his Poſſeſſion from theirs*; but ſuch a Leaſe works no Concluſion, *cauſa qua ſupra.* Ten't T. and he in Rem'r grant a Rent Charge, Ten't T. dies without Iſſue, Grantee may avow by Force of a Grant by him in Rem'r.

A Leaſe Y. by one 15 Years old is voidable at Common Law, but it may be good by Cuſtom; a Leaſe Y. by Biſhop or Ten't T. not within 32 *H.* 8. is voidable by the Succeſſor or Iſſue. A Leaſe Y. by Ten't D. tho' it be within the Statute, is void as to him in Rev'n or Rem'r. A Leaſe Y. by Parſon or Vicar, is void as to the Succeſſor, a Leaſe L. is voidable: So a Leaſe Y. by a Prebend, or Archdeacon, (*not made according to the* 32*d* H. 8.) is void as to the Succeſſor, and a Leaſe L. is voidable.

Vide Watſ. 326.

Termin

Terminus ſignifies not only the Limits of Time, but alſo the State that paſſes for that Time. As if Leſſor for 20 Years make a Leaſe to begin after the Expiration *prædicti Termini viginti annorum*, it ſhall commence on a Forfeiture, or Surrender of the firſt Leaſe, but if it had been made to begin *poſt finem viginti annorum prædict'*, ſhould not commence till the 20 Years were expired.

Proper Words to make a Leaſe are, to grant, demiſe, to farm lett, betake, and whatever Words amount to a Grant, as *Committo, &c.*

Every Leaſe Y. when it is to take Effect in Intereſt or Poſſeſſion, muſt have a certain Beginning and a certain End, therefore a Leaſe for ſo many Years as *J. S.* ſhall live is void *ab initio*: But it may be limited to take Effect upon an uncertain Contingent, as when *T. S.* ſhall pay 20 *l.* and it may be made certain by Reference to a Certainty, as for ſo many Years as *J. S.* has in the Manor of *D.* A Leaſe by a Parſon for 3 Years, and ſo from 3 Years to 3 Years, ſo long as he ſhall be Parſon, is good for 6 Years, if he continue Parſon ſo long, for ſo much only is certain, the reſt uncertain and void. A Leaſe for ſo many Years as *J. S.* ſhall name, is uncertain at firſt, but good when he has named them: A Leaſe for 21 Years, if *J. S.* live ſo long, is a good Leaſe for 21 Years, determinable on the Death of *J. S. for there is a certain Period ſaid, beyond which it cannot laſt, tho' it may determine ſooner.* Vid. 1 Rol. Ab. 850.

For

46. For many Reſpects, Leaſes at Common Law could not be made for above 40 Years, and it was the better Opinion, that no Leſſee Y. could falſify a covenous Recovery of the Freehold; but the Statute of *Glouc.* gives Power to Leſſee Y. if the Leaſe were by Writing, to be received upon Default of the Freeholder, and to try whether the Plea where moved by Colluſion; but this gave Remedy in no other Caſe, nor to Ten't by Execution, but by 21 *H.* 8. 15. all Tenants Y. and Ten'ts by Executors, may falſify all Manner of Recoveries on feigned Titles; but neither of the ſaid Acts gives any Remedy to a Guardian.

Parcener makes a Leaſe Y. and after makes Partition by Conſent, and has too little allotted to her, the Leſſee may enter into ſo much of the other's Land as will make his Part equal; but if Partition were made by the Sheriff, it ſhould have bound the Leſſee.

Ten't T. makes a Leaſe Y. marries and dies without Iſſue, the Leaſe is void as to him in Rev'n, but it ſhall be good againſt the Wife when endowed, *for her Eſtate is derived out of the Eſtate T. under which the Leſſee Y. claims by a Title prior to hers.* So if a Son be born, it ſhall be voidable or good as to him, according as it agrees with the Statute, tho' it be void as to him in Rev'n. If K. had made a Gift in T. to hold by Kt.'s Service, and Donee had made a Leaſe for 30 Y. and died, and the K. in Right of the Heir, during his Wardſhip, or primer Seiſin, had avoided the Leaſe, yet

yet the Iſſue afterwards might have affirm'd or avoided it at his Election. So notwithſtanding Ten't in Dower avoids for her Life a Leaſe Y. made after the Coverture, it ſhall be in Force after her Death.

But if a Patron grant the next Avoidance, and then Parſon, Patron and Ordinary make a Leaſe Y. of the Glebe, the Parſon dies, and the Grantee's Clerk is inducted, the Leaſe ſhall never revive, becauſe it was avoided by one who had the whole Eſtate of the Glebe in him; ſo where Husband avoids a Fine levy'd by the Wife, it ſhall not bind her after his Death; ſo where a Woman is endowed of an Advowſon, which is appropriated, and preſents, and her Clerk is inducted, and dies, the Appropriation is diſſolved, becauſe the Incumbent that came in by Preſentation had the whole Eſtate in him, *and the Fee being once diſcharged, cannot be charged again without a new Grant.* Ten't A. makes a future Leaſe, and dies, his Iſſue inſeoffs *A.* the Term commences. *A.* ſhall have the ſame Election that the Iſſue had, to affirm or avoid the Leaſe.

Leſſee Y. before he enters has an Intereſt, (called in Latin, *intereſſe Termini,*) which is grantable over, and ſhall go to Executors, &c. and ſhall remain good, tho' the Leſſor die before the Leſſee enters. A Releaſe to ſuch Leſſee by the Leſſor ſhall diſcharge the Rent reſerved, but cannot encreaſe his Eſtate: Nor can the Leſſor paſs the Rev'n by the Name of the Rev'n before the Leſſee enters. If two have ſuch a joint Intereſt,

and

and one die, it ſhall ſurvive to the other.

The Husband may diſpoſe of a Term that he has in his Wife's Right: If he do not, the Survivor of them ſhall have it. If Huſband make a Leaſe for Part of the Term, and die, the Wife ſhall have ſo much of the Term as he diſpoſed not of, and the Executors of the Husband ſhall have the Rent reſerved; not the Wife, *for ſhe claims not under the Leſſor.* If he grant the whole on Condition, and die, and his Executors enter for the Condition broken, they ſhall have the Term. *For the Husband having diſpoſed of the Whole, the Wife had no manner of Right to it left in her: But in the Caſe above, where the Heir of the Part of the Father enters for a Condition broken by the Feoffee of his Anceſtor, who was ſeiſed as Heir of the Part of the Mother, the Heir of the Part of the Mother ſhall enter upon him, for the Heir of the Part of the Father can't poſſibly hold thoſe Lands as Heir, becauſe he is not of the Blood of the firſt Purchaſer.* A Leaſe is made to Husband and Wife for L. Rem'r to the Executors of the Survivor for Y. this is not in the Diſpoſal of the Husband, becauſe it is but a Poſſibility. Husband and Wife are ejected, Husband brings Ejectment in his own Name, and recovers: This veſts the whole Term in him

Vid. Supra 18.

Leaſe Y. made to *J. S.* and his Heirs, or to a ſole Corporation and his Succeſſors, ſhall go to Executors.

A Leaſe Y. having no Beginning limited, or limited to begin from the making, or from

from henceforth, or from a Date impoſſible as the 30th of *February*, or from the End of a former Leaſe, either void, or miſrecited in a Point materjal, ſhall begin on the Day of Delivery. A Leaſe Y. limited from the Date, or the Day of the (*a*) Date, ſhall begin the Day after the Date, but if it be *a die Conſectionis*, it ſhall begin the Day after the Delivery.

(*a*) Vid. 3 Lev. 438.

If one make a Leaſe Y. of Land, or of the Herbage, or Veſture of Land, or any other Tenement manurable and corporeal, he may diſtrain for it, or have an Action of Debt; and if one make ſuch Leaſe of a Rev'n or Rem'r of ſuch Tenements, he may diſtrain, *&c.* for the Rent reſerved, when the Poſſeſſion comes to the Leſſee by Force of ſuch Leaſe. But none, except K. can reſerve a Rent out of incorporeal Inheritances, to which no Recourſe can be had for a Diſtreſs, as Fairs, Tithes, *&c.* yet if a Subject doth reſerve a Rent on a Leaſe Y. of ſuch Inheritances, he may have an Action of Debt for it by Way of Contract, but can't diſtrain; but if the Leaſe were for Life, and there had been no Covenant on the Part of the Leſſee to pay it, the Leſſor had no Remedy *at Law*; *not an Action of Debt, becauſe it was reſerved for Life, nor a Real or mix'd Action, becauſe it is but a Sum in Groſs*; *Sed Q. If he be not relieved by* 8*th Qu.* A. *which gives an Action of Debt for Rent reſerved on any Leaſe L.* 47.

There is a Difference betwixt the Words Reſervation and Exception; the firſt is proper, where ſome new Thing, not *in*

Eſſe before, is to be rendered to the Leſſor, *&c.* the ſecond is where Part of the Thing granted is ſaved to the Grantor; proper Words of the Firſt, are *reſervando, reddendo, ſolvendo, inveniendo, dummodo*, and the like; the Words *exceptis, præter, &c.* are proper for the Second; out of a General, a Part may be excepted, as out of a Manor one + Acre, but not a Part out of a Certainty, as where 20 Acres are demiſed, excepting one, *for ſuch an Exception is repugnant.*

Rent can be reſerv'd to none but the Leſſor: If two Jointenants make a Leaſe, reſerving a Rent to one of them, it ſhall go to both, unleſs it be by Indenture, in which Caſe it ſhall enure to one alone, by Way of Concluſion. Rent generally reſerv'd by Ten't in Fee, goes to him and his Heirs, *by Implication of Law*, as incident to the Rev'n; but if it be reſerved to the Leſſor, or to him and his Aſſigns, or to him and his Executors, it determines by his Death, for *Expreſſum facit ceſſare Tacitum: But it has been* (a) *reſolved, that a Rent reſerved to the Leſſor and his Executors and Aſſigns, during the Term, ſhall go to the Heir.*

(a) 1 Ven. 161. 2 Lev. 13.

Dogs, Coneies, *&c.* cannot be diſtrained for Rent, becauſe no one can have a valuable Property in them, and an Ax in a Man's Hand cutting Wood, or an Horſe which a Man is riding on, are privileg'd for the Time. (b) *But it ſeems that Horſes drawing a Cart may be diſtrained for Rent, and if a Man riding on a Horſe be Damage-feſant, the Horſe may be led to the Pound with*

(b) 1 Sid. 442, 440.

the Man upon him. Cloth in a Taylor's Shop, *&c.* cannot be diſtrain'd, becauſe it is there for the Maintenance of Trade. Nor looſe Shocks, becauſe they cannot be reſtored in the ſame Plight; (but if they be in a Cart, or Damage-feaſant, they may be diſtrain'd.) *And now by the* 2d Gul. & Mar. 5. *Corn in Sheaves or Cocks, or looſe, or in the Straw, or Hay lying in a Barn, or upon a Hovel, or Rick may be ſeiſed, ſecur'd, and lock'd up till replevied, ſo as it be not removed to the Damage of the Owner, and by the ſaid Statute, if the Ten't doth not replevy his Goods taken, within five Days, they ſhall be appraiſed by two ſworn Appraiſers, and ſold. By the* 8th *of Qu.* A. *No Goods being in any Tenement leaſed for Life, Y. or W. ſhall be taken by Virtue of an Execution, at the Suit of a Subject, unleſs the Plaintiff ſhall pay the Landlord the Arrears due for Rent for ſuch Tenement, but it is ſufficient to pay one Year's Rent tho' more be due.*

Beaſts of the Plough, or the Utenſils of Man's Trade or Profeſſion, cannot be diſtrain'd, if other Beaſts or Goods may be found; nor Things fix'd to a Freehold.

A Stranger's Beaſts that eſcape into the Land may be diſtrained for Rent, tho' they have not been Levant and Couchant. *But it ſeems that this is to be underſtood where the Beaſts that eſcape are Treſpaſſers; for it is otherwiſe, where the Ten't of the Land is in Default in not repairing his Fences, by reaſon whereof the Beaſts come upon the Land; for in this Caſe, the Leſſor cannot* 2 Lut. 1580.

diſtrain ſuch Beaſts, tho' they have been Levant and Couchant, unleſs he give Notice to the Owner, who ſuffers them to continue there afterwards, for the Leſſor is in Fault in not binding his Leſſee to repair the Fences; but the Lord of the Fee, or Grantee of a Rent-Charge, in ſuch Caſe may diſtrain ſuch Beaſts after they have been Levant and Couchant, without giving Notice, for he is no Way to blame for the Want of repairing the Fences.

He that diſtrains Things having Life, muſt put them in a Pound overt, within 3 Miles in the ſame County, either in his own Cloſe, or in another's, and the Owner muſt ſuſtain them, and ſhall be no Treſpaſſer for ſo doing; if the Pound be covert, the Diſtrainer muſt ſuſtain them at his own Coſt. He that diſtrains Goods, muſt put them in a Pound covert within 3 Miles in the ſame County: If he put them in a Pound open, he muſt anſwer for them if ſtol'n, or damag'd.

He whoſe Goods are unlawfully diſtrained, may reſcue them before they are impounded, not after, for then they are in Cuſtody of Law.

Commoner making freſh Suit may take his Goods, diſtrain'd for Damage-feaſant out of a Pound unlock'd; but if he take them out of a Pound lock'd, a Writ of *Parco fracto* lies againſt him, and he that diſtrain'd may take them again wherever he finds them. Rent due the laſt Day of the Term was not diſtrainable, becauſe the Term was ended; *but now by the 8th of Qu.* A. an

Leſſor may diſtrain for Arrears of Rent after the Leaſe is determined, provided the Diſtreſs be made within 6 Months, and during Leſſor's Title, and Ten'ts Poſſeſſion.

The Leſſor (*a*) each Year may have Debt for the yearly Rent; but if one not ſeis'd of Tenements make a Leaſe by Deed-Poll, or Parol, and bring Debt for the Rent reſerv'd, he Leſſee may plead that the Leſſor had nothing in the Tenements at the Time of the Leaſe: Or he may plead *Non dimiſit*, and give in Evidence the ſpecial Matter, (*for it is not bare uſing of the Words Leaſe, Deviſe, &c. that makes a Leaſe, but the Transferring of an Intereſt to the Leſſee*; but if the Leaſe were by Indenture, he could not plead this Plea, for an Indenture concludes both Parties. If *B.* Leſſee for *C.*'s Life, make Leaſe Y. and purchaſe the Rev'n, and *C.* die, he may confeſs and avoid notwithſtanding the Indenture, for an Intereſt paſſed by it, and therefore it works no Eſtoppel, as it would have done, if *B.* had had nothing in the Land. If one take a Leaſe of his own Land by Indenture, rendring Rent, he ſhall be eſtopp'd; but if it were only of the Herbage, he might ſay that the Leſſor had nothing in the Land; *for tho' a Man be stopped to affirm the Truth, when it is directly contrary to what he has expreſſly acknowledged by his own Deed; not ſo when it may be only prov'd to be contrary by Argument, let the conſequence be ever ſo plain.* After the Leaſe taken by one of his own Land is ended, the Eſtoppel determines: *For the ſole Intent of the Indenture is mutually to bind each*

(*a*) Vid. Co. l. 162. b. 292. b.

Party to fulfil the Agreement therein contained during the Term, which being determin'd, they have had the full Effect which was design'd.

48. At Common Law, any Eſtate of Freehold in Land might paſs by Livery of Seiſin without Deed, and Leaſes Y. of Land were good without either Livery of Seiſin, or Deed. *But now by* 29 Ca. 2. 3. *all Leaſes, Eſtates, Intereſts of Freehold, or Terms of Years, of Hereditaments, not put in Writing, and ſigned by the Parties making them, or their Agents authorized by Writing, ſhall have no greater Effect than as Eſtates at Will, except Leaſes not exceeding three Years, whereof the Rent ſhall be two Thirds of the full Value. And all Aſſignments, Grants, or Surrenders of ſuch Eſtates, not being Copyholds, muſt be by Deed ſigned,* ut ſupra, *or by Operation of Law: And all Declarations or Creations of Truſt muſt be by Writing ſign'd by the Party, or by his laſt Will by Writing, excepting Truſts reſulting by Implication of Law, or transferr'd or extinguiſhed by Act of Law.*

Vid. infra 85. Leſſee Y. may enter by Force of the Leaſe, without Livery of Seiſin; but regularly no Freehold can paſs without it. Therefore if *A.* being in his Houſe, ſay to *B.* I demiſe to you this Houſe for Life, this gave no Freehold before the Statute without Livery, nor ſince the Statute with Livery.

Livery of Seiſin is a ſolemn Delivery of the Poſſeſſion, and is Twofold. 1. In Deed. 2. In Law. Livery in Deed is when the Feoffor and Feoffee being both on the Land, the

the Feoffor delivers to the Feoffee a Turf of the Land or a Ring of Gold, or any other Thing not concerning the Land, with such like Words; 'Here I deliver you Seisin and 'Possession in the Name of all the Tene-'ments contained in the Deed of Feoff-'ment, *&c.*' And it seems that it may be well made by Words only without any solemn Act, as when the Feoffor says to the Feoffee, 'Enter into this House and enjoy 'the same according to the Form of the 'Deed, *&c.*' but the bare Delivery of the Deed on the Land shall only have the Operation to make it take Effect as a Deed, and shall not amount to Livery of Seisin, unless it be delivered in the Name of Seisin of all the Land, *&c.* Cont. Cro. Ja. 80.

Livery in Law, is when the Feoffor and Feoffee being in View of the Land, the Feoffor, *after Delivery of the Deed*, says to the Feoffee, 'Go enter into the Land, 'and take Possession thereof according to 'the Form of this Deed, *&c.*' Such Livery is good if the Feoffee enter, tho' the Land lie in another County; (*and before* 29 Ca. 3. *Livery in Law passed the Fee without any Deed*;) but if either of the Parties die before the Feoffee enters, the Livery is void, for it passes no Freehold in Deed, or in Law, before Entry; *and by the Death of the Feoffor, the Land belongs to some other, and the Feoffee cannot enter without devesting his Estate; by the Death of the Feoffee there is no Purchaser remaining to take the Estate; and the Heir shall never take by Purchase, where the Word Heir is not used to* Lit. Sec. 66.

Co.Litt.50. b. *deſcribe a Purchaſer, but only to limit the Eſtate deſign'd to paſs.* Yet if the Feoffee claim the Land as near as he dares, for fear of Death, or Battery, ſuch Entry in Law ſhall execute the Livery in Law.

A. makes a Deed of Feoffment of divers Parcels of Land to divers Men jointly, and makes Livery of one Parcel to one Feoffee according to the Deed, this paſſes all and to all. *A.* makes a Charter in Fee, and makes Livery *ſecundum formam Chartæ*, for Life, yet the Fee ſhall paſs, *for Livery is not only made for Life, but alſo according to the Form of the Deed, i. e.* according to the Quantity and Quality of the Eſtate contain'd in the Deed, *which neceſſarily includes a* (a) Litt. Sect. 159. *State L. (a) But where the Deed and the Words uſed in the Livery are inconſiſtent, nothing paſſes by the Deed.*

A. makes a Leaſe Y. by Deed, or gives Land by Deed to B. to hold to him and his Heirs after the Death of *A.* Livery of Seiſin made according to the Form of either Deed Vid. ſupra 64. (*whether before or ſince* 29 Ca. 2. 3.) is void, *for the firſt Deed expreſly gives a Chattel only, and the ſecond gives a Freehold* in Futuro, *and conſequently is void: And where the ſole Purport of the Livery is to make the Eſtate contain'd in the Deed effectual, it ſhall rather be void, than ſtrain'd to give a Freehold in the firſt Caſe, or a preſent Eſtate in the ſecond, againſt the manifeſt Intent of the Parties.*

Not only fix'd and immoveable, but Vid. ſup. 6. moveable Inheritances alſo may paſs by Livery: As where 13 Acres, lying in a Meadow

dow of 80, are by Cuſtom yearly ſet out to a Man, ſometimes in one Part, ſometimes in another; if they be Parcel of a Manor, they ſhall paſs by the Name of the Manor; if they be in Groſs, the Deed muſt be of the 13 Acres lying in the Meadow, without deſcribing any in Certainty: And by Livery of the 13 Acres allotted to the Feoffor that Year, all his Intereſt ſhall paſs. When one Manor is divided betwixt Parceners, ſo that one ſhall have it one Year, and the other the next, *&c.* without Queſtion Livery muſt be made of that: Where two Manors are divided betwixt them *alternis vicibus* for ever, a Deed of Feoffment muſt be made of both, and Livery muſt be of one of them one Year, and of the other the next.

One may have an Inheritance in an upper Chamber, and paſs it by Livery.

Diſs'ee makes a Deed of Feoffment, delivers it, and by Attorney enters and gives Seiſin; this is good, for the Deed of Feoffment hath its whole Operation from the Livery of Seiſin, and the Feoffor is in Poſſeſſion when that is made according to the Deed. But if Diſs'ee make a Leaſe Y. and deliver it, and then deliver it again upon the Ground, yet nothing paſſes to the Leſſee, for a Leaſe Y. muſt take its Effect by the Delivery of the Deed, or not at all, but at the Time of Delivery he was out of Poſſeſſion, and the ſecond Delivery of a Deed is void. But if the Deed had been delivered to a Stranger, as an Eſcrow, to be delivered as his Deed on the Land, it had been good.

Leſſor Y. of ſeveral Cloſes in one County makes Livery of them, the Leſſee or his Wife, or Servants being then in the Houſe, or on Part of the Land, this is void, for the Poſſeſſion continuing in the Leſſee, no Livery can be made of it; but if his Cattle only had been there, the Livery had been good.

49. Where a Man has two Ways of paſſing Land, both at Common Law, and intends to paſs it by one of them, *and it cannot paſs by the Way he intends*, it ſhall paſs by the other, *if there be ſufficient Words*. As if *A.* ſeis'd of two Acres, make a Leaſe Y. of one of them, and after, intending to paſs them both by Feoffment, make a Deed of Feoffment, and give Livery in the Acre in Poſſeſſion, in the Name of both, the Acre in Poſſeſſion only paſſes by the Livery; yet if the Leſſee attorn, (*which was neceſſary before* 4 & 5 Annæ 16.) the other ſhall paſs by Way of Grant of a Rev'n and Attornment, for this Way of Conveyance is by Common Law, as well as the other. But where one intends to paſs Land by Conveyance at Common Law, and it cannot paſs that Way, the Law will not raiſe a State by Way of Uſe by Force of the Statute; as if a Father make a Charter of Feoffment to his Son, and a Letter of Attorney to deliver Seiſin, and no Seiſin be delivered, the Law will not raiſe an Uſe to the Son, *by conſtruing the Charter as a Covenant to ſtand ſeiſed to the Uſe of the Son in Conſideration of natural Affection*; For the Father expreſly deſign'd that it ſhould enure by Way

of Feoffment, by Force of which Conveyance, the Law would adjudge the Son to be *in the Land by the Father, which is call'd* in the Per, whereas by the other he is *rather eſteem'd to come after him, than by him, which is call'd* in the Poſt; *and alſo if it ſhould enure by Way of Covenant to ſtand ſeis'd, it would paſs the whole Eſtate immediately, and conſequently the Livery of Seiſin could take no Effect. But later Authorities are contrary to my Lord* Coke, *as to this Point, becauſe the Principal Intent of the Deed is to paſs an Eſtate to the Son, and it ſhall not be fruſtrated by adhering too ſtrictly to the Form of the Conveyance, if by any Conſtruction it can be made effectual. Yet it has been reſolved that a Covenant to levy a Fine, which ſhall be to ſuch and ſuch Uſes, doth not amount to a Covenant to ſtand ſeis'd, becauſe then the Party could not levy the Fine: But in this Caſe, the Words of the Deed do not purport the Grant of an Eſtate paſſing immediately, as they do in the Caſe above.*

3 Lev. 9, 10, 213. 3 Lev. 371. 3 Lev. 126, 306.

A Houſe or Land belonging to an Office, or Chamber belonging to a Corody, paſs by Deed without Livery by the Grant of the Office, or Corody.

A. makes Leaſe Y. Rem'r for L. T. or Fee, and makes Livery to Leſſee Y. this paſſes the Freehold to him in Rem'r; but if Leſſee Y. enter before Livery made to him, the Freehold reſts in the Leſſor, for Livery is void when made to one in Poſſeſſion before. *A.* makes a Leaſe Y. to *B.* and *C.* without Deed, (*before* 29 Ca. 2, 3.) Rem'r

to *D.* and makes Livery to *B.* in *C.*'s Abſence in the Name of both, this veſts the Rem'r in *D. for the Law intends that there is ſuch a mutual Truſt between thoſe that take a joint Eſtate, that the Act of either of them is effectual for himſelf and the other, eſpecially where 'tis not prejudicial to him*; but when two Attornies have a bare Authority to receive Livery jointly, if it be made to one in the other's Abſence, *ſecundum formam Chartæ*, it is void. *For they being Strangers to the Land, and their Authority depending wholly upon the Letter of Attorney, their Acting is no further of Force than that is purſued.*

A. intending to infeoff *B.* and *C.* without Deed, makes Livery to *B.* in *C.*'s Abſence, in the Name of both, this is void as to *C.* (*whether made before or ſince* 29 Ca. 2. 3.) for no one in his Abſence can take or give a Freehold by Livery, but by Attorney warranted by Deed; *yet one may take a Freehold by Way of Rem'r, by Livery made to another, in his Abſence, as in the Caſe above of a Leaſe Y. Rem'r in Fee.* And if a Deed of Feoffment be made to two, Livery to one in the Name of both is good.

Tho' a Deed may be delivered without Words, yet Livery of Seiſin cannot be made without Words.

A. makes Leaſe Y. to *B.* Rem'r in Fee to *C.* and makes Livery to the Leſſee within View; this is void, for none can take by Force of ſuch Livery, but he that takes the Freehold himſelf.

When Leſſor and Leſſee come upon the Ground

Ground on Purpose for the Lessor to make, and the Lessee to take Livery, such Entry vests no Possession in the Lessee before Livery, for if it should, the Livery would be void. So when Diss'ee enters to deliver a Release to the Diss'or upon the Land by Agreement, this Entry for such Purpose avoids not the Diss'n: For *affectio tua nomen imponit operi tuo.* But if the Diss'or infeoff the Diss'ee and others, yet the Diss'ee is remitted to the Whole; *for while his Entry continues lawful, he cannot receive an Estate from the Diss'or.* Lit. Sect. 693.

If a Feoffment be made by Deed, (*or without, before* 29 Ca. 2. 3.) of divers Lands in divers Towns in the same County, Livery of one Parcel in the Name of all passes all. But if the Lands lie in several Counties, there must be Livery made in each County.

When *A.* grants Land to *B.* in Exchange for the Land which *B.* has, and *B.* grants his Land to *A.* in Exchange for the Land which *A.* has, each may enter into the other's Lands so put in Exchange, without Livery of Seisin. A Freehold likewise passes without it, by Devise, Surrender, Release or Confirmation to Lessee Y. or W. or a Fine which is a Feoffment of Record. At Common Law, an Exchange was good without Deed where the Lands lay in the same County; where they lay in divers, it was not. But Things lying in Grant could never be exchanged without Deed indented.

Things exchang'd need not be *in Esse*, before the Exchange made, for a new Rent may

may be granted out of Land, in Exchange for Land. Nor is Tranſmutation of Poſſeſſion requir'd, for a Right to Land, or Rent, may be releaſed in Exchange for Land. And the Things exchang'd need not be of the ſame Nature, ſo they concern Lands or Tenements, as Rent may be exchang'd for Land; Tithes, or Tenure by Divine Service for Things Temporal: But Land cannot be exchang'd for an Annuity.

51. In Exchange, the Eſtates mutually given in Exchange muſt be equal in Quantity, for if a Fee-ſimple be exchang'd for a Fee T. or a Tail general for a Tail ſpecial, *&c.* the Exchange is void. But the Quality of Eſtate needs not to be the ſame; *therefore*, two Men may give Land to two others jointly, and the other in Exchange give to them in Common; or they may give a ſole Eſtate, and receive a joint one. So a Subject may Exchange Land with K. tho' K. be ſeis'd of the Land exchanged in his politick Capacity, and the Subject in his natural. Nor is it neceſſary that the Parties to the Exchange have an equal Eſtate when they make it, for if Ten't T. or Husband ſeis'd in the Wife's Right make an Exchange, and give and take a Fee, it is good, till avoided by Wife or Iſſue.

This Word *Excambium*, Exchange, is abſolutely neceſſary.

Vid. ſupra 78. It muſt be executed by Entry in the Life of both Parties, for no Freehold paſſes in Deed or Law before Entry, and therefore if either of the Parties die before Entry, the Exchange is void. But it is not neceſſary that

hat the Things given or taken in Exchange hould be equal in Value, *for the Ceremonies required for the Solemnity of a Conveyance being observed, the Law examines not into the Sufficiency of the Consideration.* An Infant exchanges Land, and at full Age occupies the Land taken in Exchange, this binds him, because it was not void, but voidable.

Lessor Y. dies before the Lessee enters, yet may he enter, for by the Lease he has a Right presently to have the Land according to the Form of the Lease, and the Term being vested, the Lessor's Death cannot devest it. But if *A.* make a Deed of Feoffment, and a Letter of Attorney to deliver Seisin, and die, this avails nothing, for the other has no Right to have the Tenancy according to the Deed before Livery, and by the Death of the Feoffor, the Lands belong to some other; but if a Corporation aggregate make a Deed of Feoffment, and a Letter of Attorney to deliver Seisin, the Livery is good after the Death of the Head, because the Body Politick remains. Vid. supra 78.

An Attorney is one set in the Place of another; and is either Publick, as an Attorney at Law, whose Warrant is, *Talis potest loco suo talem Attornatum suum*; or Private, as those authoriz'd to deliver Seisin, which must be warranted by Deed; *Literæ Acquietanciæ* signifies a Deed of Acquittance, so a Letter of Attorney signifies a Warrant of Attorney by Deed. 52.

Infants, Monks, Persons attainted, Excommunicate, Villeins, *&c.* may be Attornies to deliver Seisin. A Wife, as Attorney to

to another, may deliver Seisin to her Husband; so may Husband to Wife, or he in Rem'r to the Lessee L.

If an Attorney pursue not his Warrant, what he does is of no Force. But if *A.* seised of *B.* Acre and *W.* Acre make a Deed of Feoffment of both, and a Letter of Attorney to enter into both, and make Livery of both, the Attorney enters into one, and makes Livery *secundum formam Chartæ*; this is good, tho' he enters not in the Name of both, for it is Tantamount. So if the Deed be to two, and a Letter of Attorney to deliver Seisin to both, and he deliver Livery to one only *secundum formam Chartæ*; this is good, tho' the absent Feoffee may waive it, for the Attorney pursued the Substance of his Warrant.

Lessee L. makes a Deed of Feoffment, and a Letter of Attorney to the Lessor to make Livery, and he makes it accordingly, yet he may enter for the Forfeiture. But if Lessee Y. make a Deed of Feoffment, and a Letter of Attorney to the Lessor to make Livery, and he do it accordingly, this Livery shall bind the Lessor, *for the Lessee had no Freehold whereon the Livery could enure; but in the first Case, the Lessee had an Estate which might pass by Livery, and the Lessor who was not privy to the Deed might presume that it contained no greater Estate than the Lessee could lawfully make.* But when Lessee Y. makes Livery as Attorney to the Lessor, the Freehold passes from the Lessor, and the Term is not drown'd. *For the sole Intent of the Parties is to pass the Freeh-*

Perk. 200. Q.

Freehold to the Feoffee, nor ſhall the Leſſee's Conſent that the Leſſor ſhall paſs the Freehold which he lawfully may paſs, be conſtrued as a Surrender of his Term.

If one as Procurator to another preſent to his own Benefice, he puts himſelf out of Poſſeſſion, becauſe the Preſentee comes in by the Inſtitution of the Ordinary, *who is intended, as an indifferent Judge, to admit the rightful Patron's Clerk.* If the Lord ſell his Ten't's Land by Force of the Ten't's Will, yet the Seigniory remains. But if *Ceſtui que uſe* after 1 *R.* 3. had been Grantee of a Rent, and had made a Feoffment, the Rent had been extinct, tho' the Land had paſs'd from the Feoffees, for he acted not by a bare Authority *derived from them, but his Conveyance was made good by the Statute, in Reſpect of that inherent equitable Right which he had to the Land.*

Diſs'ee of two Acres makes a Deed of Feoffment, and a Warrant of Attorney to enter into both, and to make Livery *ſecundum formam Chartæ*, the Attorney enters into one only, and makes Livery, *ſecundum formam Chartæ*, the Livery is void, becauſe the whole Warrant is not purſued, for the Eſtate of the Diſs'or in the other Acre cannot be deveſted without Entry, *and what an Attorney does is no farther valid than as he acts as ſuch; but when he takes upon him to alter or diminiſh the Grant of him that impowers him, his Acts are void.* But a Cuſtom to grant Copyhold Lands in Fee, implies a Power to grant for L. Rem'r in Fee, *for the Lord hath this Power in Reſpect of his own Intereſt*

Intereſt, not as a Subſtitute to another, & omne majus continet in ſe minus. Leſſor L. makes a Deed of Feoffment, and a Letter of Attorney to deliver Seiſin, the Attorney enters on the Leſſee, and delivers Seiſin; this is ſufficient to convey the Rev'n, *for the whole Warrant is purſued, and without doubt, if the Leſſor had done the ſame in his own Perſon, the Rev'n would have paſs'd.*

A Letter of Attorney may be contained in a Deed of Feoffment, beginning *Omnibus Chriſti, &c.* But not in an Indenture, unleſs the Attorney be made a Party. (*a*) Q.

(*a*) 2 Roll. Abr. 8, 9. As an Attorney muſt purſue the Authority expreſs'd in the Warrant, ſo muſt he obſerve the Authority implied in Law, *viz.* That the Livery be made on the Land, for if it be made within View only it is void.

53. Prohibition to forbid Ten't in Dower, or Curteſy, or Guardian in Chivalry to do Waſte, lay at Common Law; but Leſſor L. or Y. could have no Action of Waſte againſt Leſſee, before the Statute of *Glouc. cap.* 5. becauſe it was eſteem'd his Folly that he did not provide againſt it by Covenant. But now by the ſaid Statute, Waſte lies againſt the Ten'ts aforeſaid, tho' the Leaſe be but for half a Year. But the Writ muſt be general, *quod tenet ad Terminum annorum*, for there is no other Writ, and the Count muſt be ſpecial: And yet the Words of the Statute are *Tenant for Term of Years*, and the Statute is Penal, which ought to be ſtrictly conſtrued; *but tho Caſes of like Nature, which cannot be brought within the Words, ſhall not by Equity be ſubject to the Penalty of a Statute,*

Statute, yet where they are comprehended within the Meaning of the very Words, it is otherwiſe; thus the Statute which makes it High Treaſon to kill K. or Petty Treaſon to kill a Maſter, are extended to the killing of the Queen Regnant, or of a Miſtreſs, becauſe thoſe Words are meant to any of whom we ſtand related as Subjects, or Servants; ſo in this Caſe the Words Tenant for Years, ſignify any one that has a determinate Eſtate.

An Action of Waſte lies for him that has the immediate Eſtate of Inheritance for Waſte done in Houſes, Gardens, Woods, Trees, Lands, Meadows, or Exile of Men, to the Diſheriſon of him in Rev'n or Rem'r.

Waſte is either Actual, as where Leſſee pulls down Houſes; or Permiſſive, as when he ſuffers a Houſe to be burnt by Negligence, or Miſchance, or ſuffers it to be uncovered, whereby the Timber becomes rotten. To pull down a Houſe, is Waſte tho' it were ruinous when the Leſſee came in, unleſs he after rebuild it: But to ſuffer it to be uncover'd is not Waſte, if he found it uncover'd.

If Windows, Wainſcot, Benches, Doors, or Furnaces, *&c.* fix'd to the Houſe either by the Ten't, or him in Rev'n, be broken or carried away, it is Waſte.

Ten't muſt keep the Houſe from waſting, tho' no Timber grow on the Ground.

If he do, or ſuffer Waſte, and repair before the Action is brought, an Action of Waſte

Waſte lies not, but he cannot plead *non fecit vaſtum*, but muſt ſhew the ſpecial Matter.

To cut down Fruit-Trees in an Orchard or Garden is Waſte; but if they grow on other Ground, it is not.

(a) 1 R. l. A. 507. contra. It is (a) Waſte to build a new Houſe, *for it may be much to the Landlord's Prejudice*; and it is alſo Waſte to ſuffer it to be waſted when built, *for then it is as much the Landlord's as if built by himſelf.*

It is Waſte for Ten't of a Dove houſe, Warren, Park, Vivary, *&c.* to take ſo many, that ſuch ſufficient Store be not left as he found, or to ſuffer the Pale to decay, whereby the Deer are diſperſed.

To cut down or top, or do any Act that may decay Timber Trees, is Waſte, to ſuffer the young *Germins* to be deſtroyed, is Deſtruction; Oak, Aſh, and Elm, are Timber every where; Beeches, *&c.* are Timber only in thoſe Places where they are uſed in Building, for Man's Habitation.

Leſſee may cut down Underwood, but if he ſuffers the young *Germins* to be deſtroyed, or ſtub up the ſame, or cut down Beech, Maple, *&c.* ſtanding in Defence of the Houſe, or ſtub up, or ſuffer to be deſtroyed, a Quickſet Fence of White Thorn, for theſe and ſuch like Deſtructions, an Action of Waſte lies againſt him.

To cut down dead Trees is no Waſte; but turning of Trees to Coal for Fewel, when there is ſufficient Dead Wood, is Waſte: So to dig for Gravel, Stones, *&c.* in Mines not open when he came in, unleſs it be for the Repairs of his Houſe.

To

To ſuffer Houſes to be waſted, and then ſell Timber to repair them, is double Waſte.

It is Waſte to ſuffer the Wall of a River or the Sea to decay, whereby the Meadow or Marſh is ſurrounded, and becomes unprofitable. But it is no Waſte puniſhable, if it be ſuddenly ſurrounded by the River of the Sea. If the Houſe be uncovered by a Tempeſt, the Ten't muſt in convenient Time repair it, but he is not compellable to repair a Houſe wholly deſtroy'd by a Tempeſt, Lightning, Enemies, *&c.*

It is Waſte to convert Arable into Wood, or *è converſo*, or Meadow into Arable. The Ten't may take ſufficient Wood to repair the Fences as he found them, but not to make new, and he may alſo take ſufficient Botes.

To cut down Trees for Repairs, and ſell them, is Waſte by the Vendition, tho' he buy them again, and employ them in neceſſary Repairs.

Leſſor L. grants by Deed, that if waſte be done, it ſhall be redreſs'd by Neighbours without Suit; yet Waſte lies, *for ſuch Grant is void, the Deſign being not to make the Leaſe without Impeachment of Waſte, but to erect a new Court to inflict the Penalty.*

Exile of Villeins or Ten'ts W. or making them poor, whereby they depart from their Tenements, is Waſte, and in the Statute of *Glouc.* is comprehended under the general Word Waſte. Waſte and Deſtruction in their larger Senſe are convertible.

Sometimes one ſhall join in an Action of Waſte for Conformity, *in Reſpect of his Intereſt*

Intereſt in the Place waſted, tho' he has not an Inheritance; as if a Reverſion be granted to two and the Heirs of one of them; or if two Jointenants, one in Fee, the other for L. join in a Leaſe L. they ſhall join in an Action of Waſte.

Ten't T. hanging an Action of Waſte, becomes Ten't T. *Apres, &c.* the Action fails, *becauſe the Inheritance, which is the Ground of it, is determined.*

Vid. Co. L. 258.

Vid Co. fol. 54 b. who ſays If Leſſee Y. dies, an Action of Waſte lies againſt his Executors or Adminiſtrators for Waſte done before their time.

One cannot have an Action againſt an Executor for Waſte done by the Teſtator, nor can the Heir or Succeſſor have it for Waſte done in the Time of the Anceſtor or Predeceſſor, *for Actions grounded on Torts die with the Perſon.* (a) But if there be two Parceners of a Rev'n, and the Ten't do Waſte, and one of them die, the ſurviving Parcener, and the Iſſue of the other ſhall join in an Action of Waſte, (b) *and the ſurviving Parcener ſhall recover Damages. And ſee the* 20 Ed. 1. *which gives an Action of Waſte to the Heir, for Waſte done in the Life of his Anceſtor.*

(a) 1 Lutw. 803. contra.

(b) Co. L. 398. a.

54. Land is given to *A.* for L. to *B.* in Fee, *B.* ſhall not have an Action of Waſte againſt *A.* on the Statute of *Gloc,* becauſe they are Jointenants, but *B.*'s Heir ſhall.

The Action of Waſte ought regularly to be brought againſt him that did the Waſte; but if the Grantee of Ten't in Dower or by Curteſy do Waſte, the Heir in Reſpect of the Privity ſhall have an Action againſt the Ten't in Dower or by Curteſy, and recover the Place waſted againſt the Grantee. By

f he grant over his Rev'n before, or after uch Ten'ts aſſign their Eſtates, his Gran-ee ſhall have an Action againſt the Aſ-ignee only. It is ſaid, (*a*) that if Guar-ian by Kt.'s Service did Waſte, and aſ-ign'd over his Eſtate, that Action lay a-ainſt the Aſſignee. (*a*) F. N. B. 56. A. cont.

Ten't in Dower, or by Curteſy, Leſſee L. r Y. ſhall anſwer for Waſte done by a tranger; but Guardian by Kt.'s Service hould not, becauſe it was ſo penal to im, *for by Magna Charta* 4. *Gloc.* 5. he hould loſe the whole Wardſhip, let the Vaſte be ever ſo ſmall, and if that an-wered not the Damages, ſhould ſatisfy o-er and above, and if the Action were rought againſt him by the Heir of full ge, he ſhould pay treble Damages.

An Infant, Baron and Feme, ſhall be pu-iſh'd for Waſte done to a Stranger, and ſo hall the Wife, that has the Eſtate by Sur-ivor, for Waſte done by the Husband in is Life-time; *for Waſte is againſt the pub-ck Good, and the Leſſor ſhall not be preju-iced by the Tent's Nonage or Coverture.*

If there be two Jointenants for L. or Y. 2 Inſt. 402. *d one do Waſte, it is the Waſte of th as to the Place waſted, not as to the amages.*

The Husband of Leſſee L. does Waſte, e dies, no Action lies againſt him in the *nuit*, for ſhe was Ten't, and he was only iſs'd in her Right; but if the Wife were t Ten't Y. an Action would lie againſt him,

him, for the Law gives the Term to him ſurviving the Wife.

Leſſee L. grants his Eſtate on Condition, Grantee doth Waſte, Grantor re-enters, the Action lies againſt the Grantee, and the Place waſted ſhall be recovered.

(*a*) Vid. Co. L. 184. b. A (*a*) Villein being Leſſee L. doth Waſte, Lord enters, he ſhall not be puniſh'd for the Waſte done before, but for Waſte done after, he ſhall.

Vid. ſupra 57, 58. If a Leaſe be made to *A.* and his Heirs during the Life of *J. S.* and *A.* die, the Heir ſhall be puniſh'd in an Action of Waſte.

Land is let to *A.* for L. Rem'r to *B.* for L. Rem'r to *C.* in Fee, no Action of Waſte lies againſt *A.* during the Life of *B.* for *the Place waſted ſhould be recovered againſt A. it would deſtroy B.'s Rem'r of the Freehold, which is much favoured in Law.* But if *B.*'s Rem'r had been but for Years, an Action of Waſte would have lain; but *Q. If B. ſhould have no Remedy in an Action on the Caſe againſt the firſt Leſſee?* If Leſſor grant his Rev'n for Years, he cannot have an Action of Waſte during the Years, becauſe he has granted away the Rev'n, in Reſpect whereof ſuch Action is to be maintain'd; but if he had only made a Leaſe Y. of the Land in Rev'n, he might have had an Action during the Years, for *in ſuch Caſe, the Privity remain'd between him in Rev'n and the* Ten't, *as it was before*, and tho the Place waſted be recovered againſt the Ten't, yet ſuch a future Intereſt remains, *for it does not require a particular*

Eſtate

Eſtate, or depend upon the ſame as a Rem'r does.

Waſte lies not (*a*) againſt Guardian in Socage. Nor does it lie againſt Ten't by Execution. (*a*) F N. B. 59 E. 2 Inſt. 305. contra.

If Ten't L. or Y. or their Aſſigns, grant over their Eſtate, and take the Profits, Waſte lies againſt them, by 11 *H. 6. c.* 5.

If Waſte be done, *Sparſim*, here and there, in Woods or Houſes, throughout the whole, all the Woods or Houſes ſhall be recovered; but if it be in particular Parts only, ſo much only ſhall be recovered.

Trees of the Value of 3 *s.* 4 *d.* have been adjudged Waſte, but *Bracton* ſays that ſome Waſte *eſt ita modicum, ut propter illud inquiſitio non ſit facienda.*

If a Houſe be ruinous when the Ten't comes in, or be burnt by Lightening or Enemies, or the Leſſor be bound to repair and will not, or the Leaſe be without Impeachment of Waſte, tho' he be not compellable to repair, the Leſſee may fell down Timber growing on the Ground to repair or rebuild it as large as it was before, and juſtify his ſo doing, for the Law favours Houſes for Man's Habitation: And one Jointenant, or Ten't in Common, may have a Writ, *De reparatione faciendâ* againſt the other ſuffering an Houſe to decay.

Leſſee L. or Y. of Land, may dig and take the Profits of open Mines, but he cannot dig for new, notwithſtanding the Land be full with the Mines; *for where the Words will bear a natural and eaſy Conſtruction, explanatory of what otherwiſe would be*

dubious, they ſhall not be conſtrued ſo hardly againſt the Leſſor, as to put it in the Power of the Leſſee to ruin the Land: But if the Land be let with the Mines, and no Mines be open at the Time of the Leaſe, the Leſſee may dig for Mines, elſe thoſe Words would be abſolutely void.

A greater Eſtate may ſupport a leſs, *non è converſo*; as if a Leaſe L. Rem'r Y. be given to the ſame Perſon, both Eſtates remain diſtinct in him, and he may grant over either of them: But if a Leaſe Y. Rem'r L. be made to the ſame Perſon, the latter drowns the former.

Vide ſupra 31. If a Leaſe L. be made to *A.* Rem'r L. to *B.* Rem'r to *A.*'s Heirs, the Fee veſts in *A.* So if a Leaſe L. be made to *A.* Rem'r to his Executors for Y. the Chattel veſts in *A.*

Of Ten't at Will.

55. TEnant at Will is one in Poſſeſſion of Tenements by Force of a Leaſe thereof made to him to hold at Will of the Leſſor or at the Will of the Leſſee; for if it be at the Will of one of the Parties, the Law implies it ſhall be at the Will of the other alſo.

If Leſſee W. ſow Corn, or Flax, or Hemp, or ſet Roots, or any other Thing that yields a preſent annual Profit, and the Leſſor outſt him before it be ripe, the Leſſee ſhall have free Entry, Egreſs and Regreſs to cut it, *&c.* and carry it off, becauſe he knew not when the Leſſor would enter. But if Leſſee Y. ſow the Land with Corn, *&c.* and

before

before it be ripe the Term expire, the Leſſor ſhall have the Corn; and if Leſſee Y. or W. plant young Fruit-Trees, or Oaks, Aſhes, Elms, *&c.* which yield no preſent annual Profit, Leſſor ſhall have them when the Leaſe is determined.

It ſeems that if Leſſor reſerve a Rent, Leſſee (a) before the Rent-Day can't determine his Will, ſo as to avoid Payment of the Rent.

(a) 1 Rol. Abr. 861. 1 Syd. 339.

If Leſſee W. or L. or Leſſee Y. of Leſſee L. Husband ſeis'd in his Wife's Right, Ten't *pur autre Vie*, or any other whoſe Eſtate is uncertain, ſow the Land, and their Eſtate determine by Death, they, or their Executors, ſhall have the Corn. So if Ten't by Statute Merchant ſow the Corn, and then be ſatisfied by a ſudden Profit. But if Husband and Wife be Jointenants, and he ſow the Land and die, it is ſaid that the Wife ſhall have the Corn, *which, as acceſſary to the Land, ſhall go with it to the Survivor.*

If Leſſee W. determine his Will, or if a Woman, Ten't *durante viduitate*, marry, or if a Leaſe be determined by Title Paramount, or Act of Leſſee, as Forfeiture, Breach of a Condition, *&c.* the Leſſee ſhall not have the Corn.

If a Diſs'or ſow the Land, and Diſs'ee re-enter, he ſhall have the Corn, tho' it were ſevered by the Diſs'or; for his Regreſs recontinues his Freehold in Judgment of Law from the Beginning.

If Leſſee W. improves a Meadow by Over-flowing, trenching, or ſowing Hay-ſeed,

&c. the Leſſor ſhall have the Graſs, becauſe it is the natural Profit of the Land.

There is an expreſs and implied Determination of the Leſſor's Will; Expreſs, when he comes on the Land andforewarns the Leſſee to occupy; Imply'd, when without Conſent he cuts down a Tree, (not being excepted in the Leaſe,) or puts in his Beaſts to a Common appendant, or does any other Act which would amount to a Wrong if the Leaſe continued. But Words ſpoken by the Leſſor from the Ground, determine not his Will till the Leſſee have Notice; no more than one can diſcharge a Factor or Attorney without Notice. If a Leaſe W. be made to or by a Feme Sole, and ſhe marry, yet the Leaſe continues; ſo if Husband and Wife leaſe the Wife's Land at Will, and the Husband die, or if there be two joint Leſſors or Leſſees W. and one die, in all theſe Caſes the Leaſe continues.

56. As the Law gives the Corn to the Leſſee, ſo it gives him free Entry, *&c.* to carry it off, for *quando Lex aliquid alicui concedit, concedere videtur & id, ſine quo res ipſa eſſe non poteſt*, and if the Leſſee be diſturb'd of the Way, he ſhall have an Action on the Caſe. But if a Ditch be made overthwart a publick Way, no one diſturb'd by it can have an Action on the Caſe, (unleſs he ſuffer a ſpecial Damage,) leſt there ſhould be a Multiplicity of Actions; but ſuch a Nuſance muſt be preſented in the Leet, or Torn. But every Inhabitant of a Town may have an Action on the Caſe for a Diſturbance

ſturbance in a cuſtomary Watering Place, otherwiſe he ſhould be without Remedy.

There be three Kinds of Ways; 1. A Footway, in *Latin*, *Iter*. 2. A Pack and Prime-way, call'd *Actus ab agendo*. 3. *Via* or *Aditus*, which contains the other two, and a Cart-way. This is either *Via Regia*, which is common to all Men, or *communis Strata*, belonging to a City or Town, or between Neighbours and Neighbours.

If Leſſee W. bring his Goods into the Houſe, and the Leſſor ouſt him, he ſhall have free Entry, *&c.* to carry away the ſame; ſo the Executors of one ſeis'd of an Houſe in Fee or Tail, ſhall have free Entry, *&c.* to carry away the Teſtator's Goods, and what Time ſhall be reaſonable for carrying off the Goods the Juſtices ſhall determine according to their Diſcretion.

A Cottage is a little Houſe without Land. If one have a Houſe near mine, which he ſuffers to be ſo ruinous, that it is like to fall on mine, I may have a Writ *de Domo reparanda* againſt him. But a *Præcipe* lies not *de Domo*, but *de Meſſuagio*.

If a Man make a Deed of Feoffment, and deliver it, but do not give Seiſin, he to whom it is made may occupy the Land at the Will of him that made it.

No Action lies againſt Leſſee W. for perſiſſive Waſte, but if he be guilty of voluntary Waſte, Treſpaſs *quare vi*, *&c.* lies againſt him, for taking ſuch Power on him as much concerns the Freehold, that it amounts to a Determination of his Will. So he, to whom I lend my Cattle, kill them,

I may have Treſpaſs or Trover againſt him. There are no Acceſſaries in Treſpaſs or Treaſon, but all are Principals.

If Leſſee W. grants over his Eſtate, and the Grantee enter, he is Diſs'or; for tho' the Grant be void, it amounts to a Determination of the Leſſee's W. *inasmuch as by it he claims a Power inconſiſtent with a Leaſe W.*

Leſſor W. may reſerve a yearly Rent, and have an Action of Debt or diſtrain for it, for it is diſtreinable of common Right, tho' it be not Rent-Service for want of Fealty. But if the Leſſor impound the Diſtreſs on the Ground lett, this determines his Will.

Ten't W. is always by Right; Ten't at Sufferance comes in by lawful Demiſe, and holds over by Wrong; ſuch a one in Judgment of Law has a bare Poſſeſſion, and tho' the Writ *ad terminum qui præteriit*, which, *being a real Action, ſuppoſeth him Ten't of the Freehold*, lay againſt him, this is rather by Admiſſion of the Demand't than for any Freehold that is in him. As if Ten't T. of Rent grant the ſame in Fee, and die, the Heir may bring a *Formedon*, and admit himſelf out of Poſſeſſion.

No one can be Ten't by Sufferance againſt K. but his Ten't holding over is an Intruder.

If Leſſor W. die, and Leſſee continue in Poſſeſſion, he is Ten't by Sufferance, and yet the Heir by Admiſſion may have a *Mortanceſtor* againſt him, *for by the Leſſor's Death the Leaſe was abſolutely determined, and there never was any Privity between*

between the Heir and the Leſſee; but at Law, Treſpaſs or Aſſiſe of Novel Diſs'in would not lie againſt any Ten't by Sufferance, becauſe theſe Actions ſuppoſe a Wrong done to an actual Poſſeſſion. But now by 6 Annæ 18. *Guardians, Truſtees, or Husbands ſeis'd in Right of their Wives, or Ten'ts* pur autre Vie, *holding over without Conſent of the Perſons intitled, ſhall be adjudged Treſpaſſers.* But Guardian holding over is not Ten't at Sufferance, but an Abator, againſt whom *Mortanceſtor* lies, becauſe his particular Eſtate was created by Act of Law.

Of Ten't by Copy.

TEnant by Copy, is where there is a Manor, in which Time out of Mind certain Ten'ts have uſed to hold certain Tenements in Fee, T. or L. *&c.* at the Will of the Lord, according to the Cuſtom of the Manor. Such Ten'ts hold by Copy of Court-Roll, but no other Ten'ts hold by Copy. *Bracton* calls them *Villanos Sockmanos*, becauſe, tho' Free, they hold by baſe Tenure, by doing of Villein Services. 58.

A Court-Baron holden out of the Manor is void; but if a Man be Lord of two or three Manors, and there be a Cuſtom to hold a Court at one for 'em all, ſuch Courts are by Cuſtom good. This Court is of two Natures, the firſt is by Common Law, and call'd the Freeman's Court, or Court-Baron, and of this the Suitors are Judges, and the Steward is Regiſter, and this may be kept from three Weeks to three

Weeks. The 2d is a Cuſtomary Court, and concerns Copyholders, of which the Lord or his Steward is Judge; as the firſt can't be without Freeholders, ſo this can't be without Copyholders. A Court-Baron may be of this double Nature, and then the Roll contains Matters concerning both.

Any one that is lawful Lord for the Time, tho' Ten't at Will only, may make voluntary Grants of antient Copyholders that come into his Hands, and ſuch Grants ſhall bind him that has the Freehold and Inheritance. *For the Eſtate of a Copyholder depends upon the Cuſtom, which is not the leſs Strong for the Weakneſs of the Lord's Eſtate.* Diſs'ors, *&c.* having defeaſible Titles, may make Admittances, *for it would be hard that the Diſs'ee's Neglect to recover his Right ſhould bar the Copyholder of his Power to transfer his Eſtate during the Diſs'in.* But they cannot make voluntary Grants to bind the Diſs'ees, *for the Diſs'ors Want of ſuch Power is prejudicial to none but themſelves.*

If the Lord deviſe that his Executors ſhall grant ſuch Tenements for Payment of his Debts, they may make good Grants, tho' they have nothing in the Manor.

Three Things are requiſite in a Cuſtom to make a Copyhold. 1. Time out of Mind. 2. That the Tenements be within the Manor. 3. That they have been demiſed or demiſeable Time out of Mind.

One may grant a Manor by Copy according to Cuſtom, or Underwoods without the Soil, or the Herbage of Lands, and generally

nerally any Lands or Tenements, and whatever concerns them.

If ſuch Ten't alien by Deed, the Lord may enter on the Land as forfeited; but if ſuch Ten't would alien, he ought according to the Cuſtom to make a Surrender to this Effect: *Ad hanc curiam venit* A. *de* B. *& ſurſum reddidit in eadem curiâ unum Meſſuag', &c. in manus Domini ad uſum* C. *de* D. *& hæred', &c. & ſuper hoc venit prædict'* C. *de* D. *& cepit de Domino in eadem curia Meſſuag' prædict, habend' & tenend' ſibi & hæred', &c. ad voluntatem Domini ſecundum conſuetud' manerii faciend' & reddend' inde ſervitia, &c. prius debita & conſueta, & dat Domino pro fine, &c. & fecit fidelitatem.* But he, that has a Right to a Copyhold, may releaſe by Deed, or Copy, to one admitted Ten't *de facto; for nothing is more favour'd than the quieting of Poſſeſſions,* and ſuch Releaſe enures by transferring an Eſtate, but extinguiſhing the Right. A Leaſe Y. made by a Copyholder forfeits his Eſtate, but a Deed of Feoffment, or of Demiſe for Life, without Livery, does not, for nothing paſſes thereby; *and by the general Cuſtom of the Realm, a Leaſe for (a) one Year is no Forfeiture.* 59.

(a) 9 Rep. 75. b. + Rep. 26. a.

It is the general Cuſtom of the Realm to ſurrender in Court, or out of it, into the Hands of the Lord, and there is no need in Pleading to alledge a Cuſtom for it; but a Cuſtom muſt be alledg'd for a Surrender out of Court into the Hands of the Lord by the Hands of the Reeve, *&c.*

By Cuſtom a Freehold may paſs by Surrender, without the Lord's Leave, in his Court, and be delivered over to the Feoffee by the Bailiff.

The Surrender to the Lord expreſſes no Eſtate, for he is but an Inſtrument, and *ceſtuique* Uſe, when admitted, is in by the Surrender. If the Limitation be general, *ceſtuique* Uſe takes but for Life, *and the Rev'n remains in the Surrenderer, if he were ſeiſs'd in Fee.* (*b*) *But if a Copyholder for Life ſurrender to the Uſe of* A. B. *and the Lord grant the Land to* A. B. *accordingly, the Eſtate of the firſt Copyholder is determined, and no Rev'n remains in him.*

(*b*) Cro. C. 204. *Sir* W. Jones 229.

A Copyholder being a Jointenant, ſurrenders out of Court his Part into the Lord's Hands, according to the Cuſtom, to the Uſe of his Will, and dies, and this is preſented at the next Court, his Deviſee ſhall be admitted, for by the Surrender the Jointure was ſevered, and the Eſtate paſs'd to the Lord on a Condition ſubſequent, that the Surrender were preſented at the next Court. If Leſſee L. Y. or W. of a Manor take a Surrender, and his Eſtate be ended before Admittance, the Leſſor is bound to admit according to the Surrender.

A Fine may be due by Cuſtom on every Change of the Ten't, whether by Act of God or the Party; and on every Change of the Lord by Act of God; but Cuſtom to have it on Change by Demiſe of the Lord, *&c.* is void. Fines may be certain or uncertain, but if the Lord ſet an unreaſonable Fine,

Fine, the Ten't is not bound to pay it: Whether it be reaſonable or no the Judges ſhall determine.

Copyholders ſhall not implead nor be impleaded in the K.'s Courts, by the K.'s Writs, for their Tenements, but ſhall make their Plaint in the Lord's Court, and make Proteſtation to follow it in the Nature of one of the K.'s Writs, as *Formedon*, Aſſiſe, *&c.* Nor can they have a Writ of falſe Judgment, but muſt ſue to the Lord by Petition in Nature of ſuch Writ, and therein aſſign Errors. *But a Copyholder's Leſſee for one Year may have an Ejectment, for his Term is warranted by the general Cuſtom of the Realm.* 60. 1 Rep. 26. a. †

Cuſtom of it ſelf can't create a State in Tail, *for the Common Law looks on it as unreaſonable to take from a Man the Diſpoſal of his own Eſtate.* But where ſuch Cuſtom was uſed before *W.* 2. it was confirmed by it, by an equitable Conſtruction, (*a*) but the ſaid Statute extends not to other Copyhold Manors, in which ſuch Cuſtom has not been uſed; *for if it ſhould, it would be prejudicial to the Lord in preventing his Fine for Alienation, &c.* It is no Proof of ſuch Cuſtom, that Lands have been granted by Copy to many, and the Heirs of their Bodies, but if a Rem'r have been limited and enjoy'd, or the Iſſue have avoided his Anceſtor's Alienation, ſuch are good Proofs of an Eſtate-Tail. As Copyhold by Cuſtom may be intail'd, the ſame by like Cuſtom, by Surrender, may be cut off. Copyholder doing his Services, being (*a*) Q. 3 Lev. 327.

ejected

ejected by the Lord, ſhall have an Action of Treſpaſs, for he is as well an Inheritor to have his Land according to Cuſtom, as he that has a Freehold at Common Law.

Of Ten't by Verge.

61. TEnant by Verge is of the ſame Nature as Copyholder, ſo call'd, becauſe when he ſurrenders to the Lord's Hands to the Uſe of another, he delivers a Verge or Rod to the Steward, and he who ſhall have the Land takes it up in Court, and his Taking is inroll'd, and the Steward delivers to him the ſame Rod, or another in the Name of Seiſin of the Land.

A Steward may be retain'd to keep Courts Leet or Baron, without Deed, which Retainer ſhall continue till he be diſcharged. The Lord may admit out of the Court, and out of the Manor alſo.

62. In ſome Manors there is a Cuſtom, that a Copyholder, out of Court, may ſurrender to the Bailiff, *&c.* to the Uſe of another, who ſhall have the Land in F. T. or L. and that this ſhall be preſented the next Court, and if it be not then preſented it is void.

Tho' a Copyholder have an Inheritance according to the Cuſtom of the Manor, yet inaſmuch as he has no Freehold at Common Law, he is call'd Ten't by baſe Tenure. If a Man lett Land to *A.* which is not in a Manor wherein ſuch Cuſtom has been uſed, to have and to hold to him and his Heirs at the Will of the Leſſor, theſe Words [his Heirs] are void, and if he die, and his Heir

Heir enter, an Action of Treſpaſs *quare vi, &c.* lies againſt him.

If there be no Cuſtom to the Contrary, Waſte permiſſive or voluntary forfeits a Copyhold. 63.

A Copyholder ſhall do Fealty, but Leſſee W. ſhall not.

Of Homage.

WHen a Ten't did Homage, he was ungirt and bareheaded, and kneel'd on both his Knees, before the Lord ſitting, and held up his Hands together between the Lord's Hands, and ſaid thus; 'I become 'your Man from this Day forward, of Life 'and Limb, and of earthly Worſhip, and 'ſhall be True and Faithful to you, and 'bear you Faith, for the Tenements which 'I claim to hold of you ſaving the Faith 'that I owe to our Sovereign Lord the K.' and then the Lord ſo ſitting kiſs'd him. 64.

All Lands in *England* in Subjects Hands, are holden of ſome Lord by ſome Service, and were originally derived from the Crown, therefore K. is Lord mediate or immediate of them all. 65.

One under 21 Years might do Homage, but it ſeems that he can't do Fealty, becauſe he can take no Oath till the Age of 21, except that of Allegiance which he may take at 12.

An Eccleſiaſtical Perſon doing Homage, ſhould not ſay I become your Man, *&c.* for he profeſs'd himſelf to be only the Man of God, but he ſhould ſay thus, 'I do

'Homage

'Homage to you, and I ſhall be True and 'Faithful to you, *&c.*

66. A *Feme Sole* doing it ſhould not ſay, I become your Woman, for 'tis not convenient for her to ſay ſo to any but her Husband, but ſhe ſhould ſay, 'I do you Homage, and 'ſhall be True, *&c.* Husband and Wife, before Iſſue had, ſhould jointly do Homage for her Land, and the Husband ſhould ſpeak the Words, and the Lord ſhould kiſs 'em both: So in doing Fealty, both ſhall lay their Hands on the Book, he ſhall ſpeak the Words, and both ſhall kiſs the Book.

The Ten't ought to expreſs for what Lands he did the Homage. If he held other Lands of other Lords by Homage, he ſhould ſay in the End of his Homage done to one of them, 'Saving the Faith which 'I owe to our Lord the King, and to my other Lords.

None ſhould do Homage but ſuch as had a State in Fee or Tail in their own Right or another's; for it was a Maxim, That he that had a State but for L. ſhould neither do nor take Homage. But Ten't by Curteſy Initiate may [illegible] do Homage, or receive it alone in the [illegible]ht of the Wife, for he not only ha[illegible]e to be Ten't by Curteſy after the Wife's [illegible]eath, but he alſo holds the Fee in her Right during her Life. But after her Death he ſhould neither do nor receive it. So Parſon, Vicar, *&c.* ſhould neither do nor receive Homage, for they have but a qualify'd Fee. But Biſhop or Abbot might do or receive it in Right of the

the Biſhoprick, *&c.* for they have an abſolute Fee: But a Corporation Aggregate of many Perſons capable could not do it, *nor receive it. For the Fee veſts not either* 67. *jointly, or in Common, in the Perſons whereof the Society conſiſts, but in the Body Politick, form'd by Operation of Law from the Perſons ſo united,* which is inviſible, *and exiſts only in Suppoſition of Law,* and can do no Act but by Attorney, but Homage muſt be done *and* (*a*) *received in* Perſon. *But in the Caſe above, the Fee veſts in the Biſhop,* &c. *in his politick Capacity, as much as it does in the Perſon of a natural Man in his natural Capacity.*

(*a*) Litt. Sec. 92.

Leſſee L. or Y. of a Seigniory holden by Kt.'s Service, ſhould have (*b*) Eſcuage, Ward, Marriage, and Relief of the Ten'ts, tho' he could not receive Homage, and ſhould in *Avowry* ſuppoſe that the Ten't died in his Fealty.

(*b*) Co. L. 73. b.

If ſeveral Parceners held of K. *in Capite,* and were all within Age, and in Ward to K. the eldeſt alone ſhould do Homage for all; but if they were all of full Age, all ſhould do it to K. But where the Tenure was of a Subject, the Eldeſt only ſhould do it; but after Partition, every one ſhould do it, for they have not one, but ſeveral Inheritances. Notwithſtanding the Eldeſt had done Homage for all the Siſters, yet if any of them had made Feoffment of her Part, the Feoffee ſhould do it, for a Feoffment is a Partition in Law, and Ten'ts in Common do ſeveral Services. And the Feoffee

Feoffee of what Part ſoever holden by Homage, was bound to do it

Jointenants ſhould do Homage and Fealty jointly: And he that did Homage to one Jointenant or Parcener of a Seigniory, was excus'd againſt the other.

If a Ten't, from whom Homage was due, had made a Feoffment, he ſhould not do Homage, for tho' he be ſuppos'd to be Tenant as to the Lord's Avowry, (*a*) *until the Feoffee become Ten't to the Lord*, yet the Feoffee is very Ten't, and the very Ten't alone ſhall do Homage; but Donee in T. tho' he had diſcontinued the T. or a Meſne might do Homage, for they are very Ten'ts to their reſpective Lords, tho' they are not Ten'ts of the Land.

(*a*) Litt. Sec. 454.

Where Homage was Part of the Tenure, it was preſumed that the Land was holden by Kt.'s Service, if the contrary were not prov'd.

By Cuſtom, the Heir of one that held by Homage only ſhould be in Ward.

By 12 Ca. 2. 24. *This Tenure is aboliſh'd.*

Of Fealty.

FEalty, in Latin *Fidelitas*, was at Law incident to Homage, he that does it ſhall lay his right Hand on a Book, and ſay thus; 'Know ye this, my Lord, that I ſhall be 'Faithful and true to you, and Faith to 'you bear, for the Lands that I claim to 'hold of you, and that I ſhall lawfully do 'to you the Cuſtoms and Services which I 'ought to do at the Terms aſſign'd. So

'help me God.' And he ſhall kiſs the Book. But no Oath ſhould be taken by one in doing Homage to his Lord, becauſe no Subject ſhall be ſworn to another, to become his Man of Life and Limb, but to K. only; and that is call'd the Oath of Allegiance, or *Homagium Ligeum.* 68.

A Steward may take Fealty, but Homage could be done to none but the Lord.

The Ten't muſt do Fealty in his proper Perſon, but no Man by the Common Law can ſwear by Attorney.

Fealty ſhall be done by every Freeholder, and Ten't Y. and it gives a ſufficient Seiſin of all Manner of Services.

Of Eſcuage.

ESCuage, in Latin *Scutagium*, was a Species of Kt's Service. Some held by the Service of a whole Kt.'s Fee, ſome by the Service of half a Kt.'s Fee: And when the K. made a Voyage Royal into *Scotland* to ſubdue the *Scots*, he that held by a Kt.'s Fee ought to be with the K. 40 Days well arrayed for the War; he that held by half a Kt.'s Fee ought to be with him 20, and thoſe that held by more or leſs, ought to be with him more Days, or fewer, in the ſame Proportion. And one might hold to ſerve K. in his Wars in other Countries, as well as *Scotland.*

A Hide or Plow-Land, or ſo much as a Plough can till, which may contain Wood, Meadow, and Paſture, was anciently worth 5 Nobles *per Annum*, and eſteemed the Living 69.

ving of a Yeoman; 12 of theſe made one Kt.'s Fee, which was 20 *l. per Annum*; 13 Kt.'s Fees and a half made a Barony, which was 400 Marks *per Annum*; 20 Kt.'s Fees made an Earldom, which was 400*l. per Annum*; and of latter Days, two Baronies made a Marquiſdom, two Earldoms, a Dukedom; and 'tis not proper to compute what ſhall be a ſufficient Livelihood of ſuch Perſons from the Quantity of the Land, but rather from the Value of it.

By *Magna Charta* 2. The Relief of a Kt. and all above him that were Noble, was the 4th Part of their yearly Revenue. *e. g.* That of a Kt.'s was 5*l.* of a Baron 100 Marks, of an Earl 100*l.* and by the Equity of this Statute, Marquiſdoms and Dukedoms, which have been created ſince, were within the ſame Rule.

A Voyage Royal is not only when the King goes in Perſon to War, but likewiſe when his Lieutenant, or Lieutenant's Deputy goes. The Judges, not the Marſhal, ſhall determine what is a Voyage Royal. There is a Voyage Royal of Peace, as when the King's Daughter goes beyond Sea to be married, but this is not here ſpoken of.

Tenure by Cornage, tho' that were Kt.'s Service, paid no Eſcuage, for that was paid by thoſe only that held to go with the King to War.

Sir *R. R.* held by Serjeanty, to be the K.'s fore Footman when he went into *Gaſcoin*, till he had wore out a Pair of Shoes Price 4 *d.* and this being to be perform'd when the King went to *Gaſcoin*, to make War, was Kt.'s Service.

If

If the Lord himſelf went not, he ſhould pay Eſcuage, but his Ten'ts were excus'd, *for he ſhould have no Benefit by the Default of others, who was guilty of the like himſelf.* Ten't paravail going to the War excus'd all the Meſnes, and one Jointenant going excus'd all the reſt, *for the Service originally reſerv'd on the Tenure was perform'd.* Co. L. 70. b.

Magna Charta ſays, that no one ſhall be diſtrein'd for Caſtle-Guard, *ſi ipſe eam facere voluerit in propria Perſona ſua, vel per alium probum hominem faciet, ſi ipſe eam facere non poteſt propter rationabilem Cauſam.* This was declarative of the Common Law, and in like manner, if Ten't by Eſcuage ſent a Man to the War, he needed not go himſelf; and where the Act ſays *propter rationabilem Cauſam*, yet the Cauſe was neither Material nor Iſſuable, but it ſhould be left to the Ten'ts Diſcretion, for the End of the Service was the Defence of the Realm, and there were ſo many juſt Excuſes, that it would be dangerous, and tend to the Hinderance of the Service, if they ſhould be iſſuable, *& multa in jure communi contra rationem diſputandi pro communi utilitate introducta ſunt.* Every Biſhop has a Barony holden of K. *in Capite*, and ſhould do Homage, and find a Man for the War, or pay Eſcuage, but his Succeſſor ſhould never be in Ward; nor ſhould he pay Relief (unleſs he were bound to pay it by Grant or Preſcription,); yet if the Land had afterwards been convey'd to a natural Man and his Heirs, his Heir ſhould be in Ward, or pay Relief, *&c. ceſſante enim ratione legis ceſſat ipſa Lex.* 70. Co. L. 84. a.

In

71. In the Time of Sir *W. H.* Chief Justice of the Common Pleas, it was demurr'd in Law, Whether the 40 Days should be reckon'd from the Day when the Army was muster'd, or from the Time when the King first entred into the Foreign Nation. But it seems they shall be reckon'd from the latter, for then the War begins.

Justices of the Common Pleas are called *Justiciarii de Banco*, because they sit in their Seat of Justice as in a certain Place, and Writs returnable in that Court are, *Coram Justiciariis Nostris apud Westmon.* or some other certain Place. But the Court of K.'s Bench is so called, because the King anciently sate there in Person, and all Writs returnable there are, *Coram nobis ubicunque fuerimus in Angliâ.* And all Records there are stiled, *Coram Rege.*

As there is no Issue on the Fact, so there is no Demurrer in Law, but when it is join'd between the Parties.

If the Court be equally divided, or conceive great Doubt, they may adjourn a Cause into the Exchequer-Chamber, where it shall be argued by all the Judges, and if they be equally divided, it shall by 14 *Ed.* 3. 5. be decided at the next Parliament, by a Prelate, two Earls, and two Barons, commission'd by K. and if they can't determine it, the House of Lords shall. *See the Statute.*

He that demurs, confesses all Facts which are well pleaded.

When there is an Issue for Part, and Demurrer for Part, the Demurrer shall be first decided

decided, but the Court on Diſcretion may try the Iſſue firſt.

Sometimes one may plead ſpecial Matter, and conclude with Demurrer, as in an Action of Treſpaſs by *J. S.* for taking his Horſe, the Defendant pleads in Bar, that he was poſſeſs'd till diſpoſſeſs'd by *J. S.* who gave him to the Plaintiff: The Plaintiff ſays, that *J. S.* nam'd in the Bar, and *J. S.* the Plaintiff, are one Perſon, and to the Bar demurs: This is good, for without it he can't demur.

There is alſo Demurrer to Evidence, which none can refuſe to join in, except K. but in his Caſe the Court may direct the Jury to find the (*a*) *whole* ſpecial Matter.

(*a*) Dy. 53. Pla. 8.

Notwithſtanding Eſcuage were due to the Lord by Tenure, yet inaſmuch as it concern'd ſo great a Number of the Subjects of the Realm, it could neither be aſſeſs'd, nor diſtrein'd for by K. or any other Lord, till the Parliament had aſcertain'd how much every one that held by a whole Kt.'s Fee, or half a Kt.'s Fee, *&c.* that was not with K. by himſelf, or ſome other, ſhould pay to his Lord for Eſcuage. If the Ten't lied in the Hoſt, no Eſcuage could be demanded.

Eſcuage has not been aſſeſs'd ſince the Reign of *Ed.* 2. 73.

Some held by Cuſtom to pay but the Moiety, or the fourth Part of the Sum at which Eſcuage was aſſeſs'd by Parliament, and becauſe the Eſcuage which they ſhould pay was uncertain, they held by Kt.'s Ser-

vice

vice, but he that held by Eſcuage certain, *i. e.* to pay his Lord a certain Sum for it, at what Rate ſoever the Parliament aſſeſs'd it, held in Socage. If one ſpeak generally of Eſcuage, it ſhall be intended of Eſcuage incertain, becauſe that is the worthieſt Senſe; ſo a Tenure *in Capite*, being ſpoken of generally, is underſtood to mean a Tenure of K. *ſecundum excellentiam*, tho' *ex vi Termini* it may ſignify any Tenure in groſs.

The Lords of whom Lands were holden by Eſcuage ſhould have it when aſſeſs'd, for the Lands at firſt came from the Lords, and it is intended that they were given by them to the Ten'ts, to defend them as well as the King. And the Lords might diſtrein for it, or have a Writ to the Sheriff to levy it for them; but of ſuch Ten'ts as held of the King by Eſcuage, that went not to the War, K. ſhould have it, tho' they held of a Manor which he had in Ward, or by Reaſon of the Vacation of a Biſhoprick.

When the Lord diſtrein'd for Eſcuage ſo aſſeſs'd, if the Ten't would aver, that he was with the King all the Days requir'd, and the Lord averr'd the contrary, it ſhould be tried by the Certificate of the Marſhal of the King's Hoſt, under his Seal, ſent to the Juſtices.

In ſix Caſes the Trial ſhall be by Certificate.

74. 1. Whether one were with K. all the Time that he ought, ſhould be tried by the Marſhal's Certificate, as is aforeſaid.

2. If it be alledged in Avoidance of an Outlawry, that the Defend't was at *Bur-*

deaux in K.'s Service, under the Mayor of *Burdeaux*, this (*a*) ſhould be tried by the ſaid Mayor's Certificate; *but this is to be underſtood when the ſaid Town was Part of the K.'s Dominions.* (*a*) 2 E. 4. 1. a. 4 E. 4. 10. b.

3 Cuſtoms of *London* ſhall be certified by the Mayor and Aldermen, by the Mouth of the Recorder.

4. Whether one have the Privilege of a Citizen, or be a Foreigner, ſhall by tried by the Certificate of the Sheriffs.

5. Records ſhall be tried by Certificate of the Judges in whoſe Cuſtody they are.

6. Excommunication, general Baſtardy, Profeſſion, Loyalty of Marriage and the like, are regularly to be tried by the Ordinary's Certificate.

An Appeal of Death out of the Realm may, by the 1 *H.* 4. 14. be brought before the Conſtable and Marſhal, whoſe Sentence is upon Teſtimony of Witneſſes, or Combat. This was ſo reſolved in Sir *Francis Drake*'s Caſe, *ſed Regina noluit conſtituere Conſtabularium, & ideo dormivit appellum.* Some ſay, that this Statute extends to the Caſe of him that dies in *England* of a mortal Wound given out of the Realm, for it is not puniſhable at Common Law.

By 12 Ca. 2. 24. *Eſcuage was aboliſh'd.*

Of Knights Service.

IF Ten't by Kt.'s Service had died, his Heir Male being under the Age of 21 Years, the Lord ſhould have had the Land holden of

of him till ſuch Heir had arriv'd to that Age, becauſe till then he was not intended to be able to do ſuch Service, and the Judges ought to adjudge according to the common Intendment of the Law. Thus
Co.L.78.b. the Law intends that a Parſon is Reſident on his Benefice, unleſs the Contrary be prov'd, and that one Part of a Manor is of the ſame Nature of the reſt, and that a Will is not made by Colluſion, *&c.* and that Neighbours are privy to one another's Actions, and that Things are fairly done when it ſtands indifferent whether they were ſo or no, *&c.* and the Judges ought not to adjudge otherwiſe.

And if an Heir Male were unmarried at his Anceſtor's Death, the Lord ſhould have had the Ward, and Marriage of him.

But if an Heir Female at her Anceſtor's Death were fourteen Years old, the Lord ſhould not have had the Ward of her at all, becauſe ſhe might have a Husband able to do Kt.'s Service.

If an Heir Female were unmarried, and under 14 at her Anceſtor's Death, the Lord ſhould have had the Land till ſhe were 16, by *W.* 1.22. to tender convenable Marriage to her, and if the Lord had died within the two Years, the Law gave the ſame Intereſt to his Executors and Adminiſtrators. But if the Lord had granted the Wardſhip of the Body of ſuch Heir Female, and kept the
Co. L. 78, 79. Land himſelf, neither the Grantee nor Grantor ſhould have had the Benefit of the two Years: Not the Grantee, becauſe he had nothing to do with the Land granted;

not

not the Grantor, becauſe he could not tender Marriage after he had granted over the Ward of the Body. And when the Lord had married ſuch Heir Female within the two Years, ſhe and her Husband might have enter'd.

By the ſaid Act, if ſhe had refus'd the Lord's Offer, he ſhould have holden the Land till her Age of 21, and farther, till he had levied the Value of the Marriage. Tender of Marriage made to her before ſhe was 14, by a Lord who might have had the Benefit of the two Years, was void. If the Lord had tendred no Marriage to her in the two Years, he loſt the Value of it, by the expreſs Words of the Act. And notwithſtanding ſuch Heir Female were under 14, yet if ſhe were married in her Anceſtor's Time, the Lord ſhould have had the Wardſhip of the Land no longer than while ſhe was under 14.

Wardſhip was due to the Lord in reſpect of the Tenure; therefore if the Lord had releas'd his Seigniory to his Ward, or his Seigniory had deſcended to him, he ſhould have been out of Ward, for *ceſſante cauſa ceſſat Effectus*, as if Conuſee releaſe all Debts to Conuſor being taken in Execution he diſcharges the Execution.

After the Statute of Wills, if a Man had by Act executed diſpoſed of all his Kt.'s Service Land for the Advancement of his Wife, *&c.* the Heir ſhould have been barr'd as to the whole, and yet have been in Ward for the 3d Part, *by the expreſs Words of the ſaid Statute.* But if ſuch Ten't had made a Deviſe 76.

viſe of all his Kt.'s Service Land, it had been void as to a 3d Part, *for the ſaid Statute, which alone makes ſuch Deviſe good, mentions only a Deviſe of two Parts of ſuch Land.*

If Ten't by Kt.'s Service had made a Feoffment in Fee on Condition, and died, and his Heir had enter'd for a Breach, he ſhould have been in Ward, tho' neither Eſtate nor Right deſcended to him, for the Land was reſtor'd to him in Nature of a Deſcent. In like Manner, the Heir recovering in *dum non fuit compos*, *Formedon* in Deſcender, or Rem'r, as Heir, *&c.* ſhould have been in Ward. So if Ten't T. with a Rem'r in Fee, had diſcontinued, and the Diſcontinuee had infeoff'd the Heir, he ſhould have been in Ward, for as he was reſtor'd to the Title of the Land as Heir, ſo ſhould the Lord to the Title of the Wardſhip; and tho' the Anceſtor died not in the Lord's Homage, yet there was Right of Homage.

But the Heir of him that never was Ten't to the Lord, ſhould not have been in Ward, as of him that took a Fine *ſur grant* and died before Execution.

The Heir of Feoffee on Condition ſhould have been in Ward till his Eſtate were defeated on Performance of the Condition. The Heir of Conuſor of a Fine executory ſhould have been in Ward till the Conuſee had enter'd.

The Lord ſhould have had the Wardſhip of the Body of the Heir of the Diſſ'ee, and if the Diſſ'or had died ſeiſs'd, the Lord ſhould have had the Ward of the Body of

his Heir, and of the Land alſo. *But Q. how the Heir of the Diſſ'or in this Caſe could be in Ward, ſeeing the Entry of the Heir of the Diſſ'ee being within Age, could not be taken away by the Deſcent, and it (a) ſeems that the Lord in his Right might have enter'd on the Heir of the Diſſ'or.*

(a) Co Lit. 107. a. 245. a. 258. a.

The Heir of *ceſtuyque* Uſe ſhould have been in Ward by 4 *H.* 7. 17. and the Heir of the Feoffee alſo by the Common Law.

If Ten't T. with a Rem'r in Fee, had made a Feoffment, the Heir of the Feoffee ſhould have been in Ward, and the Heir of the Feoffor alſo, to the ſame Lord. But *Q. For my Lord* Coke *ſeems to ſay in this very Page, that the Heir of ſuch Ten't T. making a Feoffment ſhould not be in Ward, till he had recover'd the Land.*

If *A.* had made a Gift in Tail to *B.* and *B.* had infeoff'd *C.* and died, his Heir ſhould have been in Ward to *A.* but if *C.* had died, his Heir ſhould have been in Ward to the Lord Paramount, for *C.* was Ten't in Fait to him, and *A.* could not avow on *C.* or his Heir for the Services due to him, for then it would appear of his own Shewing that the Rev'n was out of him.

If one had holden Lands of K. by Kt.'s ſervice *in Capite*, or as of the Dutchy of *Lancaſter*, within the County *Palatine*, or as of ſome other certain Honors, (in which K. had, as it were by Preſcription, his Prerogative,) K. ſhould not only have had the Ward of the Lands holden of himſelf, but alſo of thoſe which were holden of other

Lords. And alſo all other Hereditaments,
Co.L. 78.a. as Rents, Annuities, Commons, *&c.* tho' they lay not in Tenure; but if one had holden of K. by Kt.'s Service, as of other Honors, or Manors, K. ſhould only have had the Ward of the Lands holden of himſelf.

An Heir who had been in Ward by Reaſon of a Tenure *in Capite*, when he came to Age, muſt have ſued Livery, *i. e. to have had the Lands deliver'd to him by K. the Expence of* which was Half a Year's Profit of his Lands holden. But if the Heir had been of Age at his Anceſtor's Death, he ſhould have paid for Land in Poſſeſſion a Year's Profit,
Vid. Stanf. Præ. 12, 13, &c. for the K.'s primer Seiſin, *and Livery*, and for Rev'ns expectant on Freeholds, Half a Year's Profit. And K. ſhould have had all
Stanf. Præ. 12. a. the mean Profits till Tender *of Livery* were made; ſo if a Tender were made, and not duly purſued. But the Heir that had been in Ward to K. by Reaſon of a Tenure of him, as of an Honour or Manor, might at his full Age have ſued an Ouſter *la main cum exitibus*, and if he were of full Age at his Anceſtor's Death, he ſhould have paid Relief, and not primer Seiſin.

If he that held of K. by Socage in Chief had died, his Heir being of full Age, K. ſhould have had primer Seiſin and Livery only of the Lands ſo holden, but if the Heir were under 14, K. ſhould have had neither, becauſe the Cuſtody of his Body and Lands belong'd to the Guardian in Socage.

There

There was a General Livery, and a Special Livery, the first required an Office in every County where the Heir had Land, and he must sue out his Writ of *Ætate probanda, &c.* and it concluded the Heir to deny a Tenure found in the Office. If it were not sued of all that K. ought to have, whether mentioned in the Office or not, or if the Office or Process whereon it was made, were insufficient, K. might reseise the whole Land, and should be answer'd for the whole Profits. But a special Livery which was of Grace, not of Right, contain'd a Pardon, and avoided the said Dangers and Charges. A Livery being in Nature of a Restitution was taken favourably, therefore if it were made of a Manor *cum pertinentiis*, it included the Advowson Appendant; but Letters Patent made of a Manor do not include the Advowson, unless it be mentioned.

By 2 *E.* 6. 8. these Things were provided.

1. Where an Office is found for K. he that has an Interest for Years, or by Copy, or any Rent, or Profit, of whatsoever Estate out of the Land, shall have them, tho' they be not found in the Office, in such sort as he should if no Office had been at all.

2. Where the Heir was found to be of fewer Years than of Truth he was off, he might sue out his *ætate Probanda* at his full Age, but before the Statute, he was concluded by the Office.

3. Where one was found Heir, that in Truth was not Heir, or where one Person

was found Heir in one County, and another in another County, the Party griev'd had no Remedy at Law *to get Livery made to him, unleſs he were found Heir alſo by that or another Office in the ſame County, and then it was a great Doubt whether it ſhould be tried which of them were Heir by Interpleader immediately, or at the full Age of him that was found Heir firſt; but by this Statute the Party griev'd had his Remedy by Traverſe and Interpleader immediately, ſo that he had had an Office found for him alſo in each County.*

Vid. Stanf. Præ. 58. a. 59. a.

7 Rep 44. b.

4. Where it is untruly found that one is an Ideot, Lunatick, or Dead, ſuch Office may be travers'd.

5. Where an Office finds that one attainted of Treaſon, *&c.* is ſeis'd of Lands, the Party griev'd may have a Traverſe, or *Monſtrans de droit*, tho' K. be intitl'd by double Matter of Record, and in ſuch Caſe two Writs of Search only ſhall be awarded inſtead of the four formerly uſed.

6. If an Office were found by theſe Words or the like, *quod de quo vel de quibus Tenementa Prædicta Tenentur juratores ignorant*, or if it found a Tenure of K. *per quæ ſervitia ignorant, &c.* the firſt ſhould not have been taken for an immediate Tenure of K. nor the ſecond for a Tenure *in Capite*, but a *Melius inquirendum* ſhould have been awarded by Force of the ſaid Statute, and if the Office found thereon had been contrary to the firſt, it had taken off the Force thereof; but if it had been as uncertain as the firſt, the Tenure ſhould have been taken

ken for a Tenure *in Capite, for that was most for the K's Advantage.* But if it had found a Tenure of K. as of a Manor, *per quæ Servitia, &c. ignorant*, it ſhould have been taken for a Tenure by Kt.'s Service.

7. A Traverſe was given to the Heir within Age, when Land was found to be holden of K. immediately, that was holden in Truth of others.

8. A *Scire facias* on every ſuch Traverſe muſt go out againſt the K.'s Patentee.

The Statute of *Marlbridge*, which avoided Feoffments of Kt's Service Land made by Colluſion to an eldeſt Son, extended not to Gifts in T. or Leaſes L. made to the Son, with a Rem'r to others in Fee, nor to Feoffments made to the Son jointly with others, nor to any Feoffments made for the Advancement of the Feoffor's Wife or Children, or Payment of his Debts. 78.

But in all the above-mention'd Caſes, the Heir ſhould have been in Ward for his Body, and the 3d Part of the Land, by 32 *H.* 8. 1. But if Ten't by Kt.'s Service had made a Feoffment to any of his Sons, *bonâ Fide*, for good Conſideration, or if the Eſtate convey'd to ſuch Uſes had been determin'd in the Father's Life; or the Land ſo convey'd had been afterwards convey'd away in the Father's Life; or if one had made a Feoffment to his middle Son in Tail, Rem'r to his younger Son in Tail, and died, and the Lord had ſeis'd the Wardſhip of the eldeſt Son, and a 3d Part of the Lands, and ſo the Statute had been once ſatisfy'd, and then the middle Brother had

died without Iſſue, during the Minority of the Eldeſt, by which the Land had remain'd to the Youngeſt; or if a Grandfather, in the Life of a Father, had given Lands to any of the Father's Sons; or if one had convey'd Lands to any of his collateral Blood who was not his Heir Apparent, or to a Baſtard; all theſe Caſes were out of the ſaid Statute. But if the Grandfather had conveyed Lands to the Son after the Father's Death, ſuch Conveyance had been within the Statute.

If one having none but Socage Land, had convey'd it all to ſuch Uſes, and then had purchas'd *Capite* Land, K. ſhould not have had any of the Socage Land; but if he had made a Deviſe of the Socage Land, and then had purchas'd *Capite* Land, and died, K. ſhould have had the Wardſhip of a 3d Part of the whole, *for a Deviſe takes no Effect till the Death of the Deviſor.*

79. If a Male or Female be married *infra annos Nubiles*, he at 14 or after, ſhe at 12 or after, may agree or diſagree; and they need not be married again if they then agree, or be divorc'd if they diſagree; but they can't diſagree before ſuch Age, and if they then agree, they can't after diſagree: If one Party be of the Age of Conſent, and the other under it, yet when the Party that was under comes to the Age of Conſent, either of them may diſagree.

If the Lord had once married his Ward, he ſhould not have had a 2d Marriage of him, tho' the Marriage had been diſſolv'd *ab initio* by Diſagreement, or Pre-contract.

But

But if the Anceſtor or Raviſher had married the Heir, and the Marriage had afterwards been diſſolv'd, the Lord ſhould have had the Marriage of him. If the Heir *infra annos Nubiles* had been married in his Anceſtor's Life-time, yet becauſe he might have diſagreed, the Lord might have taken him into his Poſſeſſion, or have had Raviſhment againſt a Detainer. But if he had agreed at Age of Conſent, neither K. nor Lord ſhould have had the Marriage of him.

By the Statute of *Merton* 6. If the Lord diſparag'd his Male Ward under 14, he ſhould have loſt the Ward, and the whole Profit thereof ſhould have been converted to the Ward's Benefit. The Lord was ſaid to diſparage the Heir by marrying him to the Daughter of a Villein, Burgeſs, one attainted of Felony, to a Baſtard, or Alien, one wanting Hand, or Foot, Deform'd, Paralytick, Conſumptive, *&c.* If a Leaſe were made to *A.* for L. Rem'r to *B.* in T. and *A.* had ſurrender'd to *B.* on Condition, and *B.* had died, and his Heir had been diſparag'd, and *A.* had enter'd for Condition broken, and died, *B.*'s Heir being ſtill within Age, he ſhould have been out of Ward, for he claim'd as Heir to one and the ſame Anceſtor; but if Lands had deſcended to him from another Anceſtor, he ſhould have been in Ward as to them. If there had been two Jointenants of a Ward, and one of them had diſparag'd the Heir, both ſhould have loſt the Ward, for the Words of

80.

the Statute are, that all the Profit, *&c.* ſhall be converted to the Uſe of the Heir.

81. It ſeems that no Action could be brought on this Act, becauſe none was ever brought, for *periculoſum exiſtimandum eſt quod bonorum virorum non comprobatur exemplo.* Not that a Statute can be antiquated, but it may be expounded by *non* Uſe.

82. The Lord ſhould have had the ſingle Value of the Marriage of the Heir, whether he had tender'd to him any Marriage or not, and he ſhould have as much as another had offer'd to him for the ſame *bonâ Fide*, or ſo much as it ſhould be found to be worth by lawful Trial. If the Heir had refus'd the Lord's Tender, and had remain'd unmarried during the Time that he continued in Ward, or if he had married himſelf before any Tender made to him by the Lord, the Lord ſhould have had but the ſingle Value of the Marriage; but if the Heir had refus'd the Woman tendr'd by the Lord, and married another againſt the Lord's Will, the Lord ſhould have had the double Value of the Marriage by Force of the ſaid Statute, *cap. 6.*

The Lord had two Remedies for theſe Values, *viz.* an Action, or Power to detain the Land, but he could make Uſe of neither of them till the Heir were of Age. Where the Lord held the Land for the ſingle Value, the Profits were not accounted Parcel of the Value, but as a Pledge till the Heir paid it: But where the Lord held the Land for the double Value, the Profits went in Satisfaction thereof, for the Words of the Statute of *Marton*, which gave the For-

Forfeiture, are *quod Dominus teneat terram, &c. donec inde percipere poſſet.*

There never was any Forfeiture of the Marriage of an Heir Female: And at Common Law, the Lord could not have holden over her Land after her Age of 14.

Some held by Kt.'s Service, and not by Eſcuage, as thoſe that held by Caſtle-guard, *viz.* to guard ſome certain Part of the Lord's Caſtle in Time of War, which drew to the Lord Ward and Marriage. And if the Ten't make Default in guarding the Caſtle, the Lord might diſtrain, and recover Satisfaction in Damages; but the Ten't needed not to ſtir till the Lord gave him Warning that the Enemies were coming; and tho' the Part which he was to defend was certain, yet the Time was not fix'd, as it was in Eſcuage, and the Ten't ſhould be diſcharg'd of Caſtle-guard for the Time that he ſerv'd K. in the War. 83.

A Man could not hold of one Lord to guard the Caſtle of another, therefore if the Lord had granted over his Seigniory, the Caſtle-guard was gone, for the Grantee had not the Caſtle; ſo if a Ten't holds by Suit of Court, *&c.* and the Lord grant over the Services, the Suit is gone, becauſe the Grantee has not the Manor. But tho' the Caſtle were ruin'd, the Tenure remain'd.

Anciently all Earls and Barons and Earldoms and Baronies holden of K. *in Capite*, which K. would not ſuffer to be divided, and by *Magna Charta*, they ſhould pay for Relief the fourth Part of their Revenue; but of later Days they have been made Vid. ſupra 112.

made without ſuch Earldoms or Baronies, and therefore ſuch are not within that Statute; for as a Kt. paid not Relief unleſs he had a Kt.'s Fee, ſo neither an Earl, *&c.* as ſuch, unleſs he had an Earldom, *&c.*

The Lord could not waive the Wardſhip, and have Relief in Lieu of it. But the other Lords of whom Kt.'s *Capite* Ward held other Lands, ſhould have Relief, for they could not have the Wardſhip of him. But in ſome Caſe, the Lord might have both Relief and Wardſhip of the ſame Heir, as if *A.* had holden two Manors of *B.* by Kt.'s Service, and had been diſſeis'd of one, and Diſs'or had died ſeis'd thereof, and the Ten't had died ſeis'd of the other, his Heir being within Age, the Lord ſhould have had the Wardſhip of that Manor; and if the Heir being of Age had afterwards recover'd the other, he ſhould have had Relief of him for that.

84. If Land holden by Kt.'s Service had deſcended to the Son from an Anceſtor of his Mother's Side, his Father ſhould have had the Marriage of him, and the Lord the Ward of the Land, for the Father alone while he lives ſhall have the Marriage of his Son, being his Heir Apparent, or of his Daughter, being Heir Apparent, ſo long as ſhe continues ſo. But an Alien, or one attainted of Felony, *&c.* can't have this Privilege, becauſe he can't have an Heir Apparent. Nor ſhould the Mother, or any collateral Anceſtor, have had the Cuſtody of their Heir Apparent before the Lord; for tho' they may have an Action of Treſpaſs,

quare

quare conſanguineum & hæredem rapuit, yet that lies only againſt a Stranger, and not againſt Guardian in Chivalry. If there had been Lord and Feme Ten't by Kt.'s Service, and ſhe had made a Feoffment on Condition, and had married the Lord and had Iſſue, and died, and the Iſſue had enter'd for a Breach of the Condition, and the Lord had ſeis'd the Land as Guardian, and died, his Executors ſhould not have had the Ward of the Body of the Heir, for the Lord had it not as Lord, but as Father; nor could he waive his Right as Father.

The Lord that had a Wardſhip in Right of his Seigniory, was called Guardian in Right in Chivalry. The Lord's Grantee in Poſſeſſion of the Wardſhip was call'd Guardian in Deed. 88.

Notwithſtanding an Intereſt in the Body of a Man be a Thing that properly lies in Grant, yet the Wardſhip of the Body might be granted without Deed, becauſe it was an Original Chattel, *i. e. a new Intereſt in a Thing wherein no one had an Eſtate before*, created by Law without Deed, but the Wardſhip of an Advowſon, *&c.* was not grantable without Deed, becauſe it was not an original Chattel, but was deriv'd out of the Inheritance of a Thing lying in Grant. A Leaſe Y. made by a Corporation Aggregate might at Law be aſſign'd without Deed, tho' it could not be made without Deed. *For tho' ſuch Corporation cannot make an Eſtate without Deed, yet an Eſtate when made by them has the ſame*

Properties with thoſe of the like Nature made by others.

By 12 Ca. 2. 24. *All Tenures by Kt.'s Service, and Socage* in Capite *are turn'd into common Socage, and diſcharg'd of Homage, Livery, primer Seiſin, Wardſhip, &c. which were at Law incident to ſuch Tenures,* & Aides pur file marrier, & pur faire fitz Chivalier.

And by the ſaid Statute, any Father, tho' he be under the Age of 21 *Years, may by Act executed, or by Will in Writing, diſpoſe of the Tuition of his Children, ſo long as they ſhall be under the Age of* 21 *Years, to ſuch Perſons, (except Popiſh Recuſants,) and in ſuch Manner as he ſhall think fit.*

Of Socage.

TEnure in Socage is where the Ten't holds of his Lord by certain Service, as Fealty and certain Rent, for all Manner of Services. And *at this Day* every temporal Tenure of a common Perſon is in Socage. For tho', in a ſtrict Senſe, it only ſignifies that in which the Service of the Plough was originally reſerv'd, yet largely taken it comprehends all others that have the like Effect and Incidents; as if a Roſe, Rent, or the doing the Duties of an Office were originally reſerv'd; and at Law, every temporal Tenure of a Subject, that was not Kt.'s Service, was Socage.

86. *Socagium item eſt quod Servitium Soca, i.e.* a Plough; and anciently ſuch Ten'ts ought to come with their Ploughs, for certain

tain Days in the Year, to plough and ſow the Lord's Demeſnes, or do other Works of Husbandry. And afterwards ſuch Services were chang'd into annual Rent, and yet the Name of Socage remain'd.

Such Change muſt be before Time of Memory, for at this Day they can't be chang'd by Releaſe, Confirmation, or any other Conveyance ſo long as the Seigniory remains, and in ſome Places they ſtill do ſuch Services with their Ploughs to their Lords.

Eſcuage certain makes Socage. If a Ten't had holden by Homage, Fealty, and Eſcuage, *viz.* by an Half-penny, when Eſcuage run at 40 *s.* he was Ten't by Socage. 1. Becauſe his Tenure was certain. 2. The Half-penny was not paid every Time when Eſcuage was aſſeſs'd. Vid. ſupra 116. 87.

To hold by certain Rent for Caſtle-guard is Socage, but tho' a Sum in Groſs were voluntarily paid for it, the Kt's Service remain'd; and where-ever Ten't ought to do it by himſelf or another, it was Kt.'s Service.

Whenever the Ten't holds of the Lord by Rent, this is Rent-Service, becauſe it is accompanied with ſome corporal Service, Fealty at leaſt, in Reſpect whereof the Lord may diſtrain of common Right.

If Ten't in Socage die, his Heir being under 14, whether he be his Iſſue or Couſin Male or Female, the next of Blood to the Heir, to whom the Inheritance can't deſcend, ſhall (*if the Father appoint no other Guardian, as he may do by* 12 Ca. 2. 24.)

24.) be Guardian of his Body and Land, till his Age of 14, as if the Land descend from the Father, the Mother, or other next Cousin of the Mother's Side, shall be Guardian in Socage, *& sic è converso*, where Land descends from the Mother. But the Civil Law appoints him to be Guardian that is to inherit next, which our Law says, is *committere ovem Lupo.*

Guardian in Socage shall take the Profits, and render an Account of them to the Heir, when he comes to the Age of 14, who at that Age may oust the Guardian, and occupy the Land himself. & At Law, Executors could not have an Action of Account, nor could any but K. have such an Action against them, for Matters of Account lie *so much* in Privity between the Parties, *that those who are Strangers thereto can neither tell what Allowances ought to be made by the one Party, or what might be alledg'd in Discharge of the other.* But by *W.* 2. 23. If the Heir make his Will, (which he may do at his Age of 18.) his Executors shall have an Action of Account against Guardian in Socage, and by 25 *E.* 3. 5. Executors of Executors may have such Action, and by 3 *Ed.* 3. 11. Administrators, and by 4 *&* 5 *Annæ* 16. an Action of Account lies against the Executors of a Guardian, Bailiff, or Receiver. The Guardian shall be allow'd his reasonable Costs and Expences in his Account, and if he marry the Heir under 14, he shall account to him or his Executors for the Value of it, tho' he took nothing; unless he marry him to such

Co.L.90.b.

Marriage

Marriage as is as much in Value as the Marriage of the Heir. If a Raviſher marry the Heir, the Guardian ſhall have a Writ of Raviſhment of Ward againſt him, (*by* (*a*) *the Equity of* W. 2. 35.) and ſhall recover the Value of the Marriage, and account to the Heir for it. Co. L. 89. a. (*a*) F. N. B. 139. l.

The Grandmother recovering the Heir in a Writ of Raviſhment of Ward againſt the Stepmother's Husband, was bound by Rule of Court to find Pledges *pro nutritura hæredis, & cuſtodia evidentiarum.*

If the Guardian marry the Heir after 14, he ſhall not account for it, for the Heir at that Age is out of his Cuſtody.

If a Man die ſeis'd of a Rent Charge, Common, or ſuch like Inheritances which lie not in Tenure, (and diſpoſe not of the Cuſtody of his Child,) the Heir may chuſe his Guardian; if he be ſo young that he can make no Choice, it is moſt fit that his next Couſin, to whom the Inheritance can't deſcend, ſhould have the Cuſtody of him, and whoever takes the Rent, *&c.* is chargeable in Account. But if he have any Socage Land, the Socage Guardian ſhall take the Rent Charges, *&c.* into his Cuſtody.

If the younger Brother die ſeiſed *in* 88. leaving Iſſue under 14, the Elder, not the middle Brother, ſhall be his Guardian in Socage, for in equal Degree the Law prefers him. But if Ten't T. *have no Brother or Siſter*, and die, leaving Iſſue under 14, the next Couſin of the Father's or Mother's Side, that firſt ſeiſes the Heir, ſhall have the Cuſtody of him, *for the Relation*

lation on both Sides is equal, and no Cauſe appears, wherefore either ſhould be preferr'd, and he, that firſt takes Care of the Heir, ſhews himſelf to be moſt concern'd for his Intereſt. But if Donees in Frank marriage die, their Iſſue being under 14, the next Couſin of the Part of the Donee, that was the Cauſe of the Gift, (*being not inheritable to the Donor's Rev'n,*) ſhall have the Cuſtody. *A.* ſeiſed of ſome Lands as Heir to his Father, and of others as Heir to his Mother, dies, leaving Iſſue under 14: The next Couſin of either Side, that firſt ſeiſes the Body of the Heir, ſhall have the Cuſtody of him, and the next Couſin of the Father's Part ſhall enter into the Lands of the Mother's Part, *& ſic è converſo. If a Brother purchaſe Land in Fee, and die without Iſſue, and the Land deſcend to the younger Brother, being under* 14. Q. *who ſhall be his Guardian in Socage, ſeeing whoever is of the Blood of the younger Brother, muſt alſo be of the Blood of the Elder, and conſequently capable of Inheriting.*

Regiſter 162. a. If *A.* be Guardian in Socage of *B.* under 14, he ſhall be Guardian in Socage of *another Infant whom* B. *ought to be Guardian of, as being his next Couſin, pur Cauſe de gard,* and an Action of Account lies againſt him.

An Infant, Ideot, Lunatick, *non compos,* one Blind and Dumb, Deaf and Dumb, or Leper removed, can't be Socage Guardian. Nor any to whom the Inheritance may poſſibly deſcend, therefore the Elder Brother of the Half Blood ſhall not be Guardian in

Socage

Socage to the younger Brother being Heir to the Father of *Burgh Engliſh* Lands.

The Father being Guardian in Socage, ſhall account with the Son for the Profits, *for otherwiſe it would be more for the Son's Advantage to have another for his Guardian than his Father*; but where the Father had the Cuſtody of the Body of his Heir Apparent, in Reſpect of his natural Right, he ſhould render no Account to the Heir, *for what the Father might receive on ſuch Account, would otherwiſe have belong'd not to the Heir, but to the Guardian in Kt.'s Service.* Vid. ſupra 131.

Guardians are either by Common Law, Statute, or Cuſtom.

By Common Law, there are four Kinds of Guardians, *viz.* Guardian in Chivalry, Socage, Nature, and Nurture.

There are two Kinds of Guardians by Statute. 1. By 3 & 4 *Ph. & M.* 8. the Father or Mother, (*after the Father's Death*) or any other appointed by the Father by his laſt Will or Act in his Life, ſhall have the Cuſtody of Female Children *under the Age of* 16, *and no one ſhall take them away without Conſent of ſuch Perſons, under ſevere Penalties in the ſaid Act mention'd, and by* 12 Ca. 2. 24. *Fathers may appoint Guardians for any of their Children.* 3 Rep. 39. a. Vid. ſupra 132.

3. There are alſo Guardians by Cuſtom, as of Orphans by the Cuſtom of the City of *London.*

Guardianſhip in Socage is not forfeited by Attainder, nor ſhall Husband of Guardian 89.

dian in Socage have the Guardianſhip by Survivor; *for ſuch Guardians have nothing to their own Benefit, but are only intruſted to manage the Land of the Heir, for his Benefit, with that Affection which cannot be expected from Strangers.* Guardian in Socage cannot preſent to a Benefice, becauſe he cannot account for it, *and if he ſhould have Power to preſent, he might be tempted to make an Advantage of it.* But ſome (*a*) have ſaid, *that if the Heir be within the Age of Diſcretion, the Guardian may preſent.*

Vid. ſup. 25.

(*a*) 2 Cro. 99.

2 Cro. 99. Theſe Words of the Statute of *Marlbridge* 17. that the Guardian ſhall anſwer the Heir *cum ad Legitimam Ætatem pervenerit*, are underſtood *ſecundum ſubjectam materiam* of his Age of 14, for that is his lawful Age as to this Purpoſe. Neither *Marlbridge* 23. which gives a *Capias* in Account againſt Bailiffs, nor *W.* 2. 11. which appoints Auditors to take Accounts of Bailiffs, *&c.* extend to Guardian in Socage.

If a Guardian in Socage, Bailiff, Receiver, or Factor, be robb'd without their Default, they ſhall be diſcharg'd ſo far on their Account; ſo ſhall not a Carrier, for he has his Hire. If one take Goods to be ſafely kept, or to be kept for another, and be robb'd, he ſhall anſwer for them. *But the contrary has been of late reſolv'd, for it ſeems unreaſonable that he, who without any Gratuity does a friendly Office for another, and is in no Default, ſhould be a Sufferer for his Kindneſs.* If Goods pledged

to

to a Man be ſtol'n from him, he ſhall not anſwer for them, for he had a *ſpecial* Property in them, *and can't be ſuſpected of Want of taking Care of them*; but if he had refus'd to let them be redeem'd, he ſhould have anſwer'd for them. If *A.* leave a Cheſt with *B.* and take away the Key, and acquaint not *B.* with what is in it, and the Cheſt be ſtol'n, *B.* ſhall not be charg'd, becauſe *A.* did not truſt him with it, as this Caſe is.

Whoever occupies the Heir's Land, as Socage Guardian, ſhall render an Account to the Heir, and it is no Plea in ſuch Action to ſay that he is not Prochein Amy. If Guardian in Socage occupy the Land from the Heir's Age of 14. till 21, he ſhall afterwards charg'd as Bailiff, not as Guardian. 90.

On the Death of Guardian by Kt.'s Service, the Executors ſhould have had the Wardſhip of the Heir, but not the Executors of Guardian in Socage, but the next Friend of the Heir ſhall have the Ward of him; for the Guardian in Chivalry had the Wardſhip to his own Uſe, but the Guardian in Socage has it to the Uſe of the Heir. A Biſhop's Executors ſhould have had a Kt.'s Service Ward, which he had in Right of his Biſhoprick, tho' he had died before Seiſure, for he had an Intereſt veſted in him. If a Biſhop die before he has fill'd up an Avoidance of a Church, K. ſhall preſent; ſo if a Man had holden an Advowſon of K. by Kt.'s Service, and the Church had become void, and he had died, his

his Heir being within Age; *for the Right of preſenting to a void Church is in Nature of a Choſe in Action, and is rather a Truſt than an Intereſt*, but where the Tenure is of a Subject, the Executors ſhall preſent: *For tho' the Law make ſuch a Conſtruction in Favour of K. who is always preſumed to act with the greateſt Honour, yet all Subjects ſtand in equal Degree.*

91. Every Ten't in Socage, and every Ten't by Kt.'s Service (*before* 12 Ca. 2. 24.) was bound to give the Lord Aid for the making of his eldeſt Son a Knight, at the Age of 15 Years, and for marrying of his Daughter at the Age of 7.

After the Death of Ten't in Socage, his Heir of what Age ſoever he be, ſhall pay to the Lord for Relief as much as the annual Rent amounts to, whether it were reſerv'd in Money, or any other Thing of *Engliſh* or Foreign Growth, or Manufacture; and if he hold by ten Shillings payable every 2 or 3 Years, he ſhall pay ten Shillings for Relief: And it is due to the Lord preſently, and he may diſtrain for it forthwith after the Death of the Ten't.

If the Ten't hold by the Rent of ten Shillings or a Pair of Spurs, he may pay which of them he will for Rent, and ſo may his Heir for Relief. But if the Ten't be not ready to pay one or the other when he ought for Rent, or if the Heir be not ready upon the Land preſently, (*i. e.* as ſoon as conveniently he may,) after the Death of his Anceſtor, to pay the one or the other for Relief, the Lord may diſtrain for

for which of them he pleaſes. But if either of them be tender'd according to Law, and there be none on the Lord's Part ready to receive it, the Lord can afterwards diſtrain for that only which was tender'd, but for that he may diſtrain whenever he pleaſes.

If the Ten't hold by the Rent of ten Shillings, or doing ſo many Days Work at Harveſt, or attending on the Lord at *Chriſtmas*, ten Shillings muſt be paid for Relief, for of Corporal Work or Labour no Relief is due. *Yet it has been ſaid, that the Service of doing ſo many Days Work at Harveſt may be doubled, for it is not perſonal to the Ten't but may be done by himſelf or another, and no particular Time is preſcribed for the doing of it, but only that it be done within Harveſt; but it is impoſſible to double the Ten'ts Attendance on his Lord at Chriſtmas,* &c. 2 Roll. A. 515.

If the Ten't hold of his Lord by a Roſe, or ſuch like periſhing Fruits of the Earth, which can't be kept, and die at a Time when they are not ripe, the Lord can't diſtrain for his Relief before the Time when by the Courſe of Nature they may be ripe, *Lex enim ſpectat naturæ ordinem.* 92.

Tho' the Ten't doing Fealty ſwear to do to the Lord all Manner of Services due, yet one may hold by Fealty only for all Manner of Services; and in that Caſe, when he has done it, no other Service is due: For every Ten't ought to do ſome Service to his Lord, leſt in Time it ſhould be forgotten that he holds of him, and ſo the Lord

Lord might loſe his Eſcheats, Forfeitures, *&c.* And inaſmuch as Fealty is incident to every temporal Tenure, and the Lord at firſt would have no other Service, it is Reaſon that he ſhould have that.

93. Every Leſſee L. or Y. ſhall do Fealty to the Leſſor, for they hold of him, and there can be no Tenure without ſome Service, becauſe the Service makes the Tenure; but bare Ten't at Will ſhall not do Fealty, for he has no certain Eſtate.

Of Frankalmoine.

TEnant in Frankalmoine is where an Eccleſiaſtical Corporation, whether Regular, or Secular, Sole or Aggregate, holds in Frankalmoine, that is to ſay in *Latin, in liberâ Eleemoſynâ*: Thoſe Eccleſiaſtical Perſons were called Regular, that lived under certain Rules, and had vow'd true Obedience, wilful Poverty, and perpetual Chaſtity. Others for Diſtinction-ſake were called Secular, as Biſhops, *&c.*

94. *England*'s Eccleſiaſtical State is divided into two Provinces, or Arch-Biſhopricks. The Arch-Biſhop of *Canterbury* is ſtiled *Metropolitanus & Primas totius Angliæ.* The Arch-Biſhop of *York*, *Primas Angliæ.* The Firſt has under him *Rocheſter* his principal Chaplain, *London* his Dean, *Wincheſter* his Chancellor, and all the others except *York*, *Cheſter*, *Durham*, *Carliſle* and *Man.* And every Arch-Biſhop, and Biſhop, has his Dean and Chapter.

Every

Every Dioceſe is divided into Arch-Deaconries, whereof there be 60, theſe into Deaneries, Deaneries into Pariſhes.

Anciently a Man could not alien Land which he had by Deſcent but only to God in Frankalmoine, or to one of his Blood in Frank-marriage, or to a Servant *in Remuneratione Servitii.*

Tho' the Covent were dead in Law, and could only aſſent unto Acts done to or by the Abbot, yet a Feoffment made to an Abbot and Covent and their Succeſſors was good, and the Fee veſted in the Abbot. Abbots and Biſhops might, at Law, take a Fee without Deed, and by the Word Frank or Pure Alms, without the Word Succeſſors; but a Corporation Aggregate of many Perſons capable could never take without Deed, tho' they may without the Word Succeſſors. Vid. ſup. 15.

A Chapter, in Latin *Capitulum, in a large Senſe ſignifies any Body of Eccleſiaſticks, Regular or Secular, whoſe Aſſent is required to the Acts of a Superior*, but ſtrictly it ſignifies *Clericorum Congregatio ſub uno Decano in Eccleſiâ Cathedrali.* And of this Sort ſome are ancient, others later. The later are twofold, *firſt*, Thoſe tranſlated by *Henry* 8. in the Place of Abbots and Covents, or Priors and Covents, which were Chapters while they ſtood. *Secondly*, Thoſe founded by *Henry* 8. for his new Biſhopricks. The ancient Deans come in by *Conge d' Elire*, and the King giving his Royal Aſſent, are confirm'd by the Biſhop; thoſe newly tranſlated, or 95. Co. L. 325. B.

 founded,

founded, are Donative, and by the King's Letters Patents are inſtalled.

None can take a Fee in Frankalmoine, but Eccleſiaſtical Perſons, being Bodies Politick, as Biſhop, Parſon, *&c.* or Incorporate by Letters Patents, or Preſcription.

Ten'ts in Frankalmoine were bound of Right to make Prayers for the Souls of their Founders or Grantors, and their Heirs, which were dead, and the Proſperity of thoſe which were alive, and the Law eſteemed ſuch Spiritual Services to be better for the Lords than the doing of any Temporal Services, and for this Cauſe and becauſe the Word Frankalmoine excludes all Temporal Services, Ten'ts in Frankalmoine are not bound to do Fealty.

They were ſaid to be bound of Right to do ſuch Spiritual Services, becauſe the Eccleſiaſtical Law compelled them to do them, for Want of Remedy and Want of Right is all one. But late Statutes having altered the Manner of Celebration of divine Service, if the Ten't do what is now authoriz'd, it is ſufficient whether he hold in Frankalmoine or by particular divine Service, and if he held in Frankalmoine before, he holds in Frankalmoine ſtill, for that was the original Tenure, and every one is Party, and preſumed to conſent to an Act of Parliament.

If Ten'ts in Frankalmoine neglected to ſay ſuch Maſſes, *&c.* they could not be diſtrain'd for ſuch Default, for every Diſtreſs muſt be for ſomething certain; but in Frankal-

Frankalmoine, nothing in certain is reſerv'd; and in Avowry, Damages cannot be recovered for what is neither Certain, nor can be reduced to Certainty, for *oportet quod certa res deducatur in judicium*; but to hold by Shearing all the Lord's Sheep depaſturing in the Lord's Manor, is certain enough by Reference to the Manor which is certain.

But the Lord ought to complain of ſuch Default to the Ordinary, or to the Viſiter, (if any were appointed by the Foundation,) and they ought to puniſh the Fault, and provide againſt it for the future. Where the K. is Founder, regularly the Ordinary ſhall not be Viſiter, but the Lord Chancellor, unleſs a ſpecial Viſiter be appointed on the Foundation.

There are two Juriſdictions in *England*, one of which is Eccleſiaſtical, limited to ſpiritual and particular Caſes, weich has Conuſance of Matters where the Right is Spiritual, and there is Remedy only by that Law. The other is Temporal and Secular, and guided by the General and Common Law.

If the Spiritual Tenure be by certain divine Service eſpecially expreſs'd, as to chant Maſs every Friday, or to give 100 Pence ſuch a Day in Alms; this is not Frankalmoine, for in that nothing certain is mentioned, but this is called Tenure by divine Service, and he that holds by it ſhall do Fealty; and if the Service be neglected the Lord ſhall diſtrain, and in his Avowry recover Damages, and if Iſſue be taken on the

Performance of it, the Jury ſhall try it, inaſmuch as the Service is certain, tho' it be Spiritual, and wherever Common or Statute Law gives Remedy *in foro Sæculari*, the Conuſance belongs to the King's Temporal Courts, whether the Matter be Spiritual or Temporal, unleſs the ſame Statute, which gives a Remedy in the Temporal Court, ſave the Juriſdiction of the Eccleſiaſtical Courts.

97. Fealty is incident to all Services, for which the Lord may diſtrain.

Tenure in Frankalmoine is ſo free, that, as it is ſaid, a Rent reſerv'd on a Gift of Land to hold by ſuch Tenure is void; and no one that holds by it can be charged with a Corody; and Land ſo holden, can't be ancient Demeſne in reſpect of the Charges incident thereto; and if any Certainty were reſerved on the original Grant, the Tenure is not Frankalmoine.

There were 118 Monaſteries founded by Kings of *England*, whereof ſuch Abbots and Priors, as were founded to hold *per Baroniam*, and called by Writ to Parliament, were Lords of Parliament: Of theſe there were 27 Abbots and 2 Priors. The Abbot of *Feverſham*, tho' he held by Barony, yet never ſat in Parliament, becauſe he was never called by Writ. All *Engliſh* Biſhops were originally founded by the Kings of *England*, to hold by Barony, and have been called by Writ to Parliament. The Biſhops of *Wales* were founded by the Princes of *Wales*, who held of the King as of his Crown, and when the ſaid Princes of *Wales* for-

forfeited their Principalities, the Patronages of them were annex'd to the Crown of *England*, and the ſaid Biſhops have been called by Writ to Parliament, and are chargeable with Penſions and Corodies.

Ten't in Frankalmoine ſhall do no Fealty, as is aforeſaid, in reſpect of the Spiritual Service that he is bound to perform, but Ten't in Frank-marriage ſhall do it till the fourth Degree be paſs'd, and the Alienee of Ten't in Frankalmoine ſhall do Fealty, for if they ſhould do no Service, the Land would be holden of no Man; for avoiding of which Inconvenience the Law creates the Service of Fealty, which is the loweſt that can be, and incident to every Tenure except Frankalmoine.

Since the Statute of *quia Emptores*, if a Grant be made to hold in Frankalmoine, theſe Words in Frankalmoine are void, for one can hold of Frankalmoine of none but the Donor, but by that Statute no Man can give Lands in Fee to hold of himſelf; therefore at this Day, if Land be given to hold in Frankalmoine, with a Diſpenſation of the Statutes of Mortmain, (which ought to have been made by K. and all the Lords mediate and immediate, *but now by* 7 & 8 Gul. 3. 37. *it may be granted by K. alone of whomſoever the Lands are holden.*) Yet the Feoffee ſhall hold of the ſame Lord of whom the Feoffor held by the ſame Services. So that none can hold in Frankalmoine but by Preſcription, or by Force of a Grant made before that Statute to hold in Frankalmoine, or made ſince the Statute by the 98.

King, (who is not reſtrained by it,) or by
99. a Subject licenſed by the King, and all the Lords mediate and immediate, to make ſuch Grant, for *alienatio licet prohibeatur, conſenſu tamen omnium in quorum favorem prohibita eſt, poteſt fieri, & quilibet poteſt renunciare juri pro ſe introducto.* And if a Lord confirm the Eſtate of a Parſon, to hold of him in Frankalmoine, ſuch Confirmation changes the Tenure by which he held before into Frankalmoine, and is not within the Statute of *quia Emptores*, but remains as it was at Common Law, and is good, becauſe no new Service is reſerved by it to the Lord, but only that the Parſon ſhall hold of him which he did before.

Litt Sect. 540.

If the King licenſe to alien to an Eccleſiaſtical Perſon, there is no Need of a *non Obſtante* of the Statutes of Mortmain, for where it is the expreſs Purport of the King's Grant to enable a Man to do a Thing which is prohibited, it ſhall not be ſaid that the K. knew not of the Prohibition; but ſuch Licence does not diſpence with the Statute of *quia emptores Terrarum*, unleſs it be expreſly mentioned.

The Words of the Statute of *quia Emptores* are *Dominus Rex in Parliamento, &c. ad inſtantiam magnatum Regni ſui conceſſit*, which being in an ancient Statute, are as effectual as *Authoritate Parliamenti conceſſit, &c.* And being entered on the Parliament Rolls, it ſhall be intended that the King, Lords, and Commons aſſented: And the ſaid Statute being a general Law, the Judges ſhall determine whether it be a Statute or no.

The

The Tenure in Frankalmoine is ſo appropriated to the Grantor and his Heirs, or Succeſſors, that, like the Founderſhip of a Houſe of Religion, Tenure by Homage Anceſtrel, or the Privilege of bringing a Writ of *contra formam Feoffamenti*, or *Collationis*, it cannot be transferred to any other. Therefore if the Meſne, of whom the Tenant holds in Frankalmoine, die without Heir, (by Reaſon whereof the Meſnalty Eſcheats, and drowns the Seigniory Paramount,) the Ten't ſhall hold of the Lord Paramount by Fealty only, *for ſuch Lord coming into the Place of Meſne, can claim no Services that were not due to him, except Fealty, which is incident to every Tenure*, but ſuch Lord ſhall hold of his Lord Paramount by the ſame Services by which he held of him before, *for the Privity between them is not changed.* If ſuch Meſne releaſe to his Ten't in Frankalmoine, he thereby extinguiſhes the Meſnalty, and the Ten't ſhall hold of the Lord Paramount by Fealty. *And Q. in this Caſe if he ſhall not hold alſo by the other Services by which the Meſne held, for it ſeems unreaſonable that the Lord Paramount ſhould be prejudiced by the Act of his Ten't.*

A Man can't reſerve a Rent to his Heirs, excluding himſelf; for in his Life-time they can't take, nor can they take that by Deſcent from him which he had not himſelf. Therefore if one have granted Land in Fee, before the Statute of *quia Emptores*, to hold of his Heirs, ſuch Reſervation had been void, and the Ten't ſhould have holden of the Grantor by the ſame Services by which

he held over. And at this Day, if a Man make a Gift in Tail reſerving a Rent to his Heirs, the Reſervation is void, *(a) and the Donee ſhall hold of the Donor, by the ſame Services by which he holds over.*

(a) 2 Roll's Ab. 447.

100. As the Ten't in Frankalmoine is bound to do ſuch Divine Service as the Law requires, ſo is the Lord in Conſideration thereof bound to acquit him, *i. e.* to keep him quiet from Entries, and Moleſtations, for any Services iſſuing out of the Land to any Lord above the Meſne. But he is not bound to acquit him of Suit real to a Leet, Torn, or Hundred, for that is not due from one as Ten't, but as Reſident in ſuch a Juriſdiction.

One may be bound to Acquittal three Ways. 1. By Deed. 2. By Preſcription. 3. By Tenure. And by Tenure five Ways. 1. By Owelty of Services. 2. By Tenure in Frankalmoine. 3. By Tenure in Frankmarriage. 4. By Tenure by Reaſon of Dower. 5. By (*b*) Tenure by Homage Anceſtrel.

(*b*) Litt. Sect. 144.

If ſuch Ten't be diſtrain'd by a Lord Paramount, the Meſne may put his own Beaſts into the Pound inſtead of the Ten't's.

A Man may have 6 Writs, *quia Timet*, before any Diſtreſs, Moleſtation, or Impleading. 1. A Writ of Meſne. 2. A *Warrantia Chartæ*. 3. An *Audita Querela* 4 A *Monſtraverunt*. A *Ne injuſte Vexes*. 6. A *Curiâ Claudendâ*.

The Proceſs in a Writ of Meſne, at Common Law, is Summons, Attachment, and Diſtreſs

Diſtreſs infinite, in the County where the Writ is brought. And the Plaintiff ſhall have Judgment to recover his Acquittal; and if he be diſtrein'd, or damnified, his Damages and Coſts. And the Plaintiff in a Writ of Meſne may ſtill chuſe ſuch Proceſs, or the Proceſs given by *W.* 2.

By Force of *W.* 2. the Meſne ſhall be forejudged of his Meſnalty, in two Caſes. 1. If he do not appear upon the Proceſs given by that Statute. 2. If he ſuffer the Ten't, after he has recovered his Acquittal, to be diſtrein'd a ſecond Time.

A Fore-judgment againſt Baron and Feme, or againſt a Ten't in Tail, ſhall bind the Wife, or Iſſue till they reverſe it in a Writ of Error.

The Words of the Judgment by which the Meſne is fore-judged are to this Effect, That the Meſne ſhall loſe the Services of the Ten't, and that the Ten't ſhall hold of the Lord Paramount by the ſame Services by which the Meſne held. Therefore if two Jointenants bring a Writ of Meſne, and one of them be ſummon'd and ſever'd, the other can't fore-judge the Meſne, for he alone can't be Attendant to the Lord Paramount as the Meſne was. And if there be two Jointenants Meſnes, and one make Default, and the other appear, there can be no Fore-judgment, *for the Meſnalty continuing in him that made no Default, the Ten't can't hold by the ſame Services by which both the Meſnes held.*

The Fore-judgment of a Meſne who is a Diſs'or ſhall not bind his Diſs'ee; ſo neither ſhall a Fore-judgment of a Ten't being a Diſs'or, bind his Diſs'ee.

The Fore-judgment of a Daughter binds the Son *in Ventre ſa mere* born after, and the Fore-judgment of the Heir of a Man profeſs'd did bind the Anceſtor being afterwards deraigned, for in both Caſes the Perſon fore-judged alone had Right at the Time.

A Biſhop, *&c.* can't be fore-judg'd, for he alone can't prejudice the Church.

There muſt be but one Meſne between the Lord diſtraining, and the Tenant diſtrained, by the expreſs Words of the Act.

Of Homage Anceſtrel.

TEnure by Homage Anceſtrel was where the Ten't held by Homage, and he and his Anceſtors had Time out of Mind holden of the Lord and his Anceſtors or Predeceſ-
101. ſors by Homage, and done Homage to them. And the Lord, that had receiv'd Homage of ſuch a Ten't, was bound to warrant him when impleaded of Land ſo holden. And ſuch Ten't was not bound to attorn to the Lord's Grantee in a *per quæ Servitia*, unleſs the Conuſee would grant to warrant the Land to him. And there was a Writ *de Homagio capiendo* to compel the Lord to receive the Homage of ſuch Ten't for the Benefit of his Warranty.

Such

Such Tenure likewiſe bound the Lord to Acquittal.

If the Lord being vouch'd by Force of ſuch Tenure, had demanded what the Ten't had to bind him to Warranty, and the Ten't had ſhewn that the Land was holden by Homage Anceſtrel, *&c.* if the Lord had never received Homage of the Ten't, or his Anceſtors, he might have diſclaim'd in the Seigniory, and ouſted the Ten't of the Warranty, and by ſuch Diſclaimer the Seigniory was extinct, and the Ten't held of the next Lord. But he that had receiv'd Homage could not diſclaim. And a Tenant in Frankalmoine is ſo much favour'd, that the Lord in a Writ of Meſne brought by ſuch Tenant can't diſclaim.

Voucher, in Latin *Vocatio*, is when the Ten't calls another into Court that is bound to warrant the Land, *i. e.* either to defend the Right againſt the Demandant, or yield other Land in Value. It can be only us'd in Actions wherein a Freehold or Inheritance is demanded, except only in a Writ of Ward, *in which tho' a Chattel were only demanded, yet the Tenure of the Inheritance, which is in the Realty, was the Ground of the Action.* But no Voucher lies on the Grant of any other Chattel with Warranty, but an Action of Covenant, if it were granted with Deed; if without Deed, Caſe, or Deceit.

The firſt Proceſs in Voucher is a Summons *ad Warrantizandum.* And if the Vouchee be ſummon'd, and make Default,

a *Magnum*

a *Magnum Cape ad Valenciam* ſhall be awarded; and then if the Vouchee make Default again, Judgment ſhall be given againſt the Ten't, and for him to have in Value againſt the Vouchee. If the Vouchee appear, and after make Default, a *Parvum Cape ad Valenciam* ſhall be awarded; and if he make Default again, the ſame Judg-
102. ment ſhall be given as before. If the Sheriff return that the Vouchee hath nothing, then after an *Alias & Pluries*, a *Sequatur ſub ſuo periculo* ſhall go, whereon if the Sheriff make the like Return, the Demandant ſhall have Judgment againſt the Ten't, but the Ten't ſhall not have Judgment againſt the Vouchee, for he was never warn'd, and it appears that he has nothing. And after ſuch Judgment the Ten't may have a *Warrantia Chartæ*, or vouch again; but where he hath had Judgment to recover in
(*a*) Co. L. 393. a. Value, he ſhall never vouch again, (*a*) *if by ſuch Judgment he had full Benefit of the Warranty.*

Foreign Voucher is when one impleaded in a particular Juriſdiction, vouches and prays that the Vouchee may be ſummon'd in ſome other County, out of ſuch Juriſdiction.

The Civil Law binds every Man to warrant what he ſells, but the Common Law does not without a Warranty in Deed, or Law, for the Rule is, *Caveat Emptor.*

In Voucher by Force of Homage Anceſtrel, the Land which the Lord had at the Time of the Voucher, by Purchaſe, or Deſcent,

ſcent ſhould be charg'd; for it could not be known whether he had any from him that created the Seigniory, becauſe it had laſted Time out of Mind, and it was not the Grant of any Anceſtor, but the Continuance of the Privity between each Family, Time out of Mind, which created the Warranty. But an Heir ſhall be charg'd, by an expreſs Warranty, only for ſuch Land as he has by Deſcent from him that created it; and an Heir ſhall be charg'd in a Writ of Annuity, only in Reſpect of thoſe Lands which he has by Deſcent from the Grantor; and for this Reaſon a Writ of Annuity will not lie againſt him by Preſcription.

Warrantia Chartæ binds the Land from the Time of the Writ, but Voucher binds it only from the Time of the Voucher. A Judgment in an Action of Debt againſt an Heir binds the Land deſcended from the Time of the Writ, for the Action was brought in Reſpect of ſuch Land; but a Judgment for one's own Debt binds the Land from the Time of the Judgment only, for ſuch Action is brought in Reſpect of the Perſon, and not of the Land. Iſſues return'd on a Juror ſhall be levied on the Feoffee, tho' they were loſt before the Feoffment; for the Juror was return'd in Reſpect of the Freehold; but where the Plaintiff is nonſuit, the Land which he had at the Time of the Amerciament only ſhall be charg'd, not what he had at the Time of finding the Pledges, for he is amerced for a perſonal Default, and not in Reſpect of his Land; *but in the Caſe of the Juror*

the

the Land is charged with the Iſſues by the Sheriff's Return, and cannot be diſcharged but by the Appearance of the Ten't.

If the Feoffor bind ſpecial Land to Warranty, his Perſon is hereby bound, but not the Land, unleſs he have it at the Time of the Voucher.

A Body Politick can't hold by Homage Anceſtrel, but Land might be ſo holden of a Body Politick, provided the Tenure continued in the Blood of the Ten'ts, and the Privity of Succeſſion continued in the ſame Body Politick; and if a Prior and Covent had been tranſlated to a Dean and Chapter, the Ten'ts, that held of them by ſuch Tenure before, held ſtill by the ſame, for the Body was never diſſolv'd, but in Effect remain'd.

No Sole Corporation, or Head of a Corporation Aggregate of many Perſons dead in Law, can diſclaim, for the Law would never truſt one ſingle Perſon with the Power of diſpoſing of the Inheritance of his Houſe. But if an Abbot or Prior had diſ-
103. claim'd in a *Quo Warranto* brought by K. this ſhould have bound their Succeſſors; ſo ſhould their Confeſſion of the Action in a Writ of Annuity, becauſe it can't be falſify'd by an higher Action; and a Re-
5 Rep. 14. b. covery in a real Action againſt them, or a Fine levy'd by them bound the Succeſſors, till they had avoided it in a Writ of Right.

If an Abbot, *&c.* had ſuffer'd Judgment in an Action of Debt, or acknowledged a Statute,

Statute, or Recognizance, with Conſent of the Covent, or without, the Succeſſor could not have avoided Execution, becauſe it was but a Chattel. Vide 43 El. 9.

If ſuch Ten't had alien'd, his Alienee ſhould not have holden by Homage Anceſtrel, nor ſhould the Alienor himſelf, if he had after taken back a State in Fee, for the uninterrupted Continuance of the Privity in the Blood of the Ten't was diſſolv'd by the Alienation. So if ſuch Ten't had made a Feoffment on Condition, and re-entred for a Breach, he ſhould not have holden by Homage Anceſtrel again. As if *ceſtuyque* Uſe had made a Feoffment on Condition before 27 *H.* 8. and re-enter'd for a Breach, he ſhould have detain'd the Land againſt the Feoffees, for the whole Eſtate and Privity was for the Time taken out of them, and thereby diſſolv'd for ever. If a Ten't by Homage Anceſtrel were vouch'd by his Alienee, yet could he not vouch the Lord, for notwithſtanding the Vouchee comes in in Privity of his former Eſtate, as to many Purpoſes, yet ſuch Vouchee could not come in as Ten't by Homage Anceſtrel, as to this Purpoſe, becauſe by the Alienation the Privity between him and the Lord was diſcontinu'd. But if ſuch Ten't had made a Gift in T. or Leaſe L. he might have vouch'd the Lord, in Reſpect of the Rev'n, which he held of him by the ſame Tenure by which he held the Land in Poſſeſſion. And if he had loſt the Land in a falſe or feign'd Action, yet the Privity remain'd.

The

104. The Ten't who had once done Homage was not compellable to do it again to any Heir, or Alienee of the Lord; but Fealty is incident to every Attornment. If the Lord had been ſeis'd in Tail, and diſcontinu'd, and taken back a State in Fee, and receiv'd Homage, and died, his Iſſue being remitted to the State T. might have compell'd the Ten't to have done Homage to him, becauſe the Remitter defeated the Eſtate in Fee, in Reſpect whereof the Father receiv'd the Homage. If the Ten't had alien'd all his Land holden by Homage, he was not afterwards compellable to do Homage, but the Alienee was, whether the Alienor had done it or no. And if the Ten't had holden of the Lord as of a Manor, and had done Homage to the Lord, and afterwards the Menor had been recover'd from the Lord by Title or Pretence of Title, the Ten't was compellable to do it again to the Recoverer, for the Eſtate of him that receiv'd it was defeated by the Recovery, and a Ten't can't falſify a Recovery againſt his Lord. But the Recoverers in a common Recovery, which is by Conſent, and is a common Aſſurance, whereon an Uſe may be limited, had no Remedy to diſtrain for Homage, *&c.* without Attornment of the Ten't, before 7 *H.* 8. 4. which gives them the ſame Remedy the Recoverers ſhould have had: Therefore if one make a Leaſe Y. to begin at *Michaelmas*, reſerving Rent, and before *Michaelmas* ſuffer ſuch a Recovery, the Recoverers may diſtrain for it, becauſe the Recoverers might have done

ſo

ſo if they had not ſuffer'd it; but if the Conuſee of a Fine had ſuffer'd ſuch a Recovery of a Manor before the Ten'ts had attorn'd, the Recoverers could not diſtrain, becauſe the Conuſee himſelf could not, *before* 4 & 5 *Annæ* 16. And ſuch Recoverers could not have an Action of Debt, or of Waſte, againſt the Leſſee, before 21 *H.* 8. 15. which gives them ſuch Actions.

If the Ten't had offered to do Homage to his Lord, and he had refus'd to accept it, he ſhould not afterwards have diſtrain'd him for it, unleſs he had firſt required it, and the Ten't had refuſed it. 105.

He that ought to do Homage, or Fealty, muſt ſeek the Lord if he be in *England*; but it is ſufficient to tender Rent upon the Land.

By 12 Ca. 2. 24. *Tenure by Homage is taken away, and conſequently Tenure by Homage Anceſtrel.*

Of Grand Serjeanty.

TEnure by Grand Serjeanty is where a a Man holds of the King by ſuch Services as he ought to perform in proper Perſon to the King, as to carry his Lance, to be Marſhal, Conſtable, or Chamberlain of *England*, or by any Office concerning the King's Treaſury, or Adminiſtration of Juſtice. 106.

One held *per Serjeantiam ad inveniendum unum hominem ad guerram ubicunque infra* 4 *Maria*; this was Grand Serjeanty, becauſe it was to be done by the Body of a Man,

107. Man, and if he could not find another to do it, he was bound to do it himſelf.

To hold of K. by Cornage, *i. e.* to blow a Horn to give Warning of the Enemies coming into *England*, was Grand Serjeanty; to hold by it of a Subject, was Kt.'s Service.

Ten't by Grand Serjeanty was never bound to pay Eſcuage, or Aid *pur faire fitz Chivalier, &c. So that* 12 Ca. 2. 24. *is declarative as to this Point.* His Relief is a whole Year's Value of his Land, over and above all Charges and Repriſes, whereas Ten't by Eſcuage paid but the 4th Part. Ten't by Eſcuage ought to do his Service out of the Realm; theſe for the moſt part within it. None can hold by Serjeanty but of the King. Ten't by Eſcuage might make his Deputy; but when Ten't by Grand Serjeanty is to perform any High Office of State, or to do any Service to the Perſon of the King, he can't make a Deputy without Licence: But he that held to ſerve him in his Wars within the Realm, or by Cornage, might make a Deputy.

At *Ric.* 2d's Coronation, *W.* a Citizen was not admitted to hold the King's Towel, but he did it by the Earl of *C.* his Deputy. One *Furneval* of an ancient Family was firſt made Kt. and then ſupported the King's right Hand. *Anne* Counteſs of *P.* who held by ſuch like Service, was adjudged to do it by Deputy, becauſe a Woman can't do it in Perſon. And *John* Earl of *P.* being under Age, and in the King's Cuſtody, the King appointed

appointed one to perform ſuch Service in his Room.

Ten't by Grand Serjeanty was ſaid to hold by Kt.'s Service, becauſe the King had Ward and Marriage of ſuch Ten't; *and tho' theſe are taken away by* 12 Ca. 2. 24. *yet the honorary Services of Grand Serjeanty ſtill remains.*

Of Petit Serjeanty.

PEtit Serjeanty is when one holds of the King by rendring yearly a Sword, or Bow, or ſuch other Things touching the Wars, and this is Socage in Effect, becauſe ſuch Ten't is not bound to do any Thing in his proper Perſon touching the War. 108.

All grand and petit Serjeanty is *in Capite: viz.* holden of the King as of his Crown; but he that holds of him as of an Honour, or as of his Perſon, (as when a Tenure in Groſs Eſcheats to K.) holds not *in Capite*; for no Tenure can be *in Capite*, but what was originally created by the King. An Honour is the moſt noble Seigniory, as being originally created by K. yet it may be granted to others.

Of Tenure in Burgage.

TEnure in Burgage is where there is an antient Burgh, the Tenements whereof are holden of the Lord, whether K. or other Lord, Spiritual or Temporal, by certain Rent, and ſuch Tenure is but Socage. A Burgh is an ancient Town that ſends Members 109.

Members to Parliament. It was anciently taken for thoſe Companies of 10 Families that were one another's Pledges, from the *Saxon* Word *Borhoe*, a Pledge, whence came Headborough, *&c.* A City is a Burgh incorporate, that has, or has had a Biſhop; and tho' the Biſhoprick be diſſolved, yet the City remains. Every City is not a County, for it may be Part of the County in which it is.

110. Parliament ſo called *a Parler la ment*, was, before the Conqueſt, called the great Court or Meeting of the King and all the wiſe Men. The King has divers Councils. 1. The Parliament, called *Commune Concilium*. 2. *Magnum Concilium*, the Lords in Parliament, or out of Parliament. 3. His Privy Council for Matters of State. 4. His Judges of the Law, for Law Matters.

For the greater Part, ſuch Boroughs have Cuſtoms and Uſages which others have not; ſome have this Cuſtom, that the youngeſt Son ſhall inherit all his Father's Tenements within the Borough, whether he were ſeis'd in Fee-ſimple or Fee-tail, or of a Freehold deſcendible, as Heir to his Father, which is called Borough *Engliſh*.

A Cuſtom of deviſing Lands, Borough *Engliſh*, or Gavelkind, may be alledged in a City, Borough, or Manor, but not in an upland Town that is neither City nor Borough. But a Cuſtom to have a Way to the Church, and to make By-Laws for the Reparation of the Church, and well ordering of the Commons and ſuch like Things, may be alledged in an upland Town that is neither City nor Borough.

Vide ſupra 49.

By

By Cuſtom of ſome Burghs the Wife ſhall have Frank-Bank, *i. e.* ſhall be endowed of all her Husband's Tenements; in ſome ſhe ſhall have the Whole, or Half, *dum ſola*, or *caſta vixerit.* In Gavelkind the Husband ſhall be Ten't by Curteſy, whether he has had Iſſue by his Wife or not.

By the Cuſtom of ſome Boroughs one may deviſe Lands and Tenements within them, and thereby prevent the Deſcent thereof to his Heir. And the Deviſee may enter after his Death, and he has the Freehold and Intereſt in Law in him before he enters, nor does he want the Executor's Conſent, as a Deviſee of Chattels real or perſonal does. If he be holden out, he may enter, or have the Writ *Ex gravi querelâ*, but this lies not after actual Poſſeſſion; but it is incident to the Cuſtom to deviſe, for otherwiſe a Deſcent caſt before the Entry of the Deviſee would put him without Remedy. *But Quære of this Reaſon, for it is ſaid,* Co. Lit. 240. b. *That a Deſcent takes not away Entry of a Deviſee, (claiming as it ſeems by the Statute of Wills,) becauſe it is his only Remedy, and why may not the ſame Rule be apply'd to Deviſee claiming by Cuſtom?* By ſome Cuſtom, Land might paſs by Will nuncupative, as well as by Writing, *but this is reſtrained by the* 29 Ca. 2. 3. 111.

Bro. Aſſiſe, 354.

The Writ *Ex gravi querelâ* thus expreſſes the Cuſtom to deviſe Lands, *Quod liceat unicuique civi ſive Burgenſi ejuſdem Civitatis, ſive Burgi Tenementa ſua in eadem*

dem civitate ſive Burgo in Teſtamento ſuo in ultimâ voluntate ſua tanquam catalla ſua legare cuicunque voluerit. By ſuch Cuſtom he may deviſe a Rent out of his Land, but not Land intailed.

By 32 *H.* 8. 1. Lands holden in Socage are generally deviſeable by Will in Writing: But before Kt.'s Service was aboliſhed, a Deviſe was void as to the third Part of Kt.'s Service Land, and the Third of the Whole, whether Socage or Kt.'s Service Land belonging to the King's Ten't by Kt.'s Service *in Capite.* But a Deviſe of Kt.'s Service Land might by Cuſtom be good for the Whole, for this Statute being in the Affirmative, took not away the Cuſtom of deviſing Lands. If one had conveyed Part of his Kt.'s Service Land to the Uſe of his Wife, or Children, or Payment of his Debts, he could have deviſed no more of the Reſidue than would have made two full 3d Parts of the Whole: And if he had convey'd two full 3d Parts to ſuch Uſes, he could not have made any Deviſe, except of the Rev'n of thoſe two Parts: But that he might deviſe, becauſe it was the Intention of the Act that he might diſpoſe entirely of two Parts. Hereditaments of uncertain Value, as Waifes, Eſtrays, *&c.* could not be deviſed as Part of the two Parts, or left to deſcend as Part of the Third; but if they had been holden of K. by Kt.'s Service *in Capite*, they reſtrain'd the Deviſe of more than of two Parts: So did a Rev'n on a State Tail, tho' it were dry and fruitleſs. The

Vide ſupra 120, 126.

Rem'r mentioned in the Act muſt be underſtood to be ſuch as drew Ward and Marriage; therefore if a Rev'n holden by Kt.'s Service *in Capite* were granted to one for L. the Rem'r to another in Fee, the Grantee of the Rem'r was not reſtrain'd during the Life of the Grantee L. but after his Death he was, *becauſe then his Heir ſhould have been in Ward, &c.* If a Leaſe had been made for L. Rem'r in Fee, this Rem'r was not within the Act. If K.'s Ten't by Kt.'s Service *in Capite* had made a Deviſe of all his Socage Land, and then had ſold his *Capite* Land, and died, the Deviſe had been good for the Whole. A Deviſe of a Rent or Common, out of all the Kt.'s Service Land, was good for two Parts only, but Socage Land may be all charged. Vide ſupra 126.

If ſuch Ten't ſo reſtrain'd had made a Feoffment to the Uſe of ſuch whom he ſhould appoint by Will, the Uſe veſted in the Feoffor, and he had a qualified Fee: And if his Will limited the Eſtates according to this Power, 'twas good for the Whole; *for the Uſes of a Feoffment may be as well declared by a Will as any other Writing, tho' of it ſelf it be of no Force to paſs Land, and the Perſons appointed in Purſuance of ſuch Power are in by the original Feoffment, as ſuch as if they had been named in it.* But if ſuch Feoffor had deviſed the Land as Owner, without any Reference to ſuch Power, two parts only of the Land would have paſſed. If a Man had conveyed two Parts to the Uſe of his Wife, *&c.* and afterwards had made

made ſuch Feoffment of the 3d, and then had deviſed the Land without any
112. Reference to ſuch Power reſerv'd in ſuch Feoffment, yet the whole ſhould paſs, for the Will muſt enure to declare the Uſes of the Feoffment, or elſe it would be void. But a Feoffment made to the Uſe of one's Will had given him no ſuch Power, *for it had been no more than if he had ſaid to the Uſe of thoſe to whom I ſhall deviſe the Land, for here the Will is not mentioned as a Writing declaring the Uſes of another Conveyance, but ſeems to be taken in its natural Senſe, as a Writing in it ſelf Effectual to paſs Lands.*

Altho' a Man cannot convey Land to his Wife, in Poſſeſſion, Rev'n, or Rem'r, for that they are one Perſon in Law; yet, by ſuch Cuſtom, he may deviſe to his Wife, becauſe it takes not Effect till after his Death. And the Husband may covenant with others to ſtand ſeiſed to his Wife's Uſe, or he may make a Feoffment to her Uſe, which ſhall be executed by Operation of the Statute; but if he make a Covenant with his Wife to ſtand ſeiſed to her Uſe, it is void.

The Wife is diſabled to contract without the Husband's Conſent; but if *ceſtuyque* Uſe had deviſed that his Wife ſhould ſell his Land, ſhe might ſell it to a 3d Husband, for ſhe did it *in auter droit*, and the Vendee was in by the Deviſor.

A Wife cannot deviſe Land to her Huſband, for it ſhall be intended to be done by Coertion.

Cum duo inter ſe pugnantia reperiuntur in Teſtamento ultimum ratum eſt.

By ſome Cuſtom, any Land may be deviſed; by others, that which one has by Purchaſe only; by ſome, any Eſtate; by others, for L. only.

By ſuch Cuſtom one may deviſe that his Executors ſhall ſell his Land, and in ſuch Caſe the Land deſcends to the Heir, *becauſe not the Land, but an Authority only is deviſed*, and the Executors may alien to whom they pleaſe, even without Deed, (*before* 29 Ca. 2. 3.) whether the Thing deviſed to be ſold lie in Grant, or not, for the Alienee is in by the Deviſor; *& conſuetudo ex rationabili cauſa uſitata privat communem Legem*; but Cuſtom can't take off the Force of a Statute.

Where ſuch Power is deviſed to Executors all muſt join in the Sale, and if one die, it being a bare Authority, cannot ſurvive to the reſt; but if Land be deviſed to *A.* for L. and then ſuch Power be given to 3 or 4 Executors, *&c.* and one of them die, 113.
and then *A.* die, the Survivors may ſell, for during the Life of *A.* they could not ſell, and the plural Number of them ſtill remains. Yet if a Will give ſuch a Power to certain Perſons, naming them by their Names, as to *J. S. J. N. J. D.* and one of them die, the Survivors can't ſell, for the Words of the Will in that Caſe can't be ſatisfied. But if a Will give Land to Executors to be ſold, and one of them die, the ſurvivors may ſell, for the Truſt, being coupled with an Intereſt, ſhall ſurvive together with it. In both Caſes, they may

ſell Part at one Time and Part at another.

At Law if one had refus'd to ſell, the others could not ſell, but now by 21 *H.* 8. 4. notwithſtanding Part of thoſe to whom ſuch Power is deviſed refuſe, the reſt may ſell. And ſo may ſuch of thoſe to whom Land is deviſed to be ſold who are willing, tho' the others refuſe, by a favourable Conſtruction of that Statute. But they can't in either Caſe ſell it to the Executor that refuſed, for he is privy to the Will, and Executor ſtill, *and Executors do ſo repreſent the Perſon of the Teſtator, that he does as it were ſurvive in all, and every one of them, and one of them, as Executor, can no more contract with another, than the Teſtator could with Part of himſelf.*

It is ſafeſt in giving ſuch Power by Deviſe, to limit it to the Survivors or Survivor, or thoſe that prove the Will, *&c.* and when an Eſtate is deviſed to Executors to be ſold it is adviſeable to appoint, that the Profits taken by them before the Sale ſhall be Aſſets, for otherwiſe they ſhall not. (*a*) *Q.*

(*a*) Dyer 310. pl. 78. Off. of Executors 105. Litt. Sect. 383.

No Cuſtom is allowable but ſuch as has been uſed by Title of Preſcription, *viz.* Time out of Mind. When the Time of Limitation of a Writ of Right, which is a Writ of the higheſt Nature, was from the Reign of *R.* 1. it was ſaid, That the Continuance of an Uſage ſince that Time, was a good Title of Preſcription; *ſed* (*b*) *quære, Whether by the ſame Reaſon the Continuance of an Uſage for* 60 *Years, can make a Title of Preſcription, ſince by* 32 H. 8. 2. *the Limitation of a Writ of Right is*

(*b*) 2 Rol. A. 269.

is reduced to that Time, for the Practice is otherwiſe. And there is alſo another Title of Preſcription, which was at Law before any Statute, and this is where a Cuſtom or Uſage has been uſed *de Tempore, cujus contrarium Memoria hominum non exiſtit,* which is the Way of Pleading a Title of Preſcription, and is as much as to ſay, that no Man alive has any Knowledge to the contrary, or has heard any Proof to the contrary.

Preſcription for the moſt part is Perſonal, being made in the Name of a certain Perſon and his Anceſtors, or thoſe whoſe Eſtate he has, or of a Body Politick, and their Predeceſſors. As when *J. S.* ſeiſed of a Manor in Fee, preſcribes that *J. S.* and his Anceſtors, and all thoſe whoſe Eſtate he has in the ſaid Manor, have Time out of Mind had, and uſed to have, Common of Paſture in ſuch a Place, being the Land of another, this is properly Preſcription. But Cuſtom is local; as when a Copyholder of the Manor of *D.* pleads that within the ſaid Manor there is and has been ſuch a Cuſtom Time out of Mind uſed, that all the Copyholders of the ſaid Manor have had, and uſed to have, Common of Paſture in ſuch a Waſte of the Lord, Parcel of the Manor. *For a Copyholder cannot lay a Preſcription in himſelf and his Anceſtors, by Reaſon of the Baſeneſs of his Eſtate.* Both Cuſtom and Preſcription require Uſage Time out of Mind, and long, continual, and peaceable Poſſeſſion. If one preſcribe to have a Rent, and a Diſtreſs for it, it can't

114. be avoided by Pleading that the Rent was always paid by Coertion of Diſtreſs.

Preſcription, being only the Uſage of the Country cannot give a Man a Title to Things that can't be ſeiſed as forfeited, till the Cauſe of Forfeiture appear of Record, as Deodands, or the Goods and Chattels of Traitors, Felons, Felons of themſelves, Fugitives, or thoſe that be put in Exigent. Nor can it give a Title to *Things highly touching the King's Prerogative, as* Conuſance of Pleas, to have a Sanctuary, to make a Corporation, Coroner, Conſervators of the Peace, *&c.*

But Treaſure Trove, Waiſes, Eſtrays, Wreck, to hold Pleas, Court-Leets, Hundreds, infange Thief, outfange Thief, a Park, Warren, Royal Fiſhes, Fairs, Markets, Frank-foldage, keeping of a Gaol, Toll, *&c.* may be claimed by Preſcription without any Matter of Record. And a County Palatine may be claimed by Preſcription, and by Reaſon thereof *bona Felonum, &c.* And a Corporation may be by Preſcription.

A Title gain'd by Preſcription, can't be loſt by Interruption of Poſſeſſion 10 or 20 Years, unleſs there be an Interruption of the Right, as by Unity of Poſſeſſion of Rent, or Common, and the Land charged therewith, of an Eſtate equally high and perdurable in both.

In a Writ of Meſne the Plaintiff preſcrib'd that the Defendant and his Anceſtors had acquitted the Plaintiff and his Anceſtors and the

Thus if a man has by Preſcription a Rent in Fee iſſuing out of ſuch Land, as aſſiſe comes to Rein for Long. The Poſſeſſion of ye Rent is ſuſpended during the Life, but if it is not interrupted by his Heirs ſhall reclaim it by Preſcription.

the Ter tenant, Time out of Mind, the Jury find that the Feoffor of the Plaintiff's Grandfather, and his Anceſtors, had been acquitted Time out of Mind, but that ſince no Acquittal had been, and Judgment was given for the Plaintiff, for the Subſtance of the Iſſue was found, tho' not the Letter; and a Title once gained is not loſt by wrongful Ceſſer. So where the Plaintiff in Prohibition alledged a *Modus* by Preſcription, and the Jury found ſuch Preſcription 20 Years before, and ſince a Payment in Specie, the Plaintiff had Judgment, for the Subſtance of the Iſſue is found. And a Commoner that takes a Leaſe for Years of the Land, may claim his Common after the End of the Leaſe, for the Inheritance of the Common was ſuſpended, not extinct, and the Title of Inheritance gained by Preſcription can't be waiv'd *in Pais*.

Limitation of Writs is the Time preſcribed by Statute, within which the Demandant muſt prove himſelf, or ſome of his Anceſtors, to be ſeiſed, ſee 32 *H.* 8. 2. but the ſaid Statute ſhall not be extended to make Seiſin within the Time preſcribed neceſſary in ſuch Caſes, in which by common Poſſibility it cannot be had within it, as in a Formedon in Deſcender, *quare Impedit*, *&c.* or to make it neceſſary in ſuch Caſes wherein Seiſin is not material, as in caſe of Rent created by Deed, or reſerved on a particular Eſtate. *By the* 21 Ja. I. 16. *He that has Right or Title of Entry, muſt enter within* 20 *Years.* See the Statute. 115.

There may be ſufficient Proof by Record or Writing, tho' it exceed the proper Me-

mory of any Man living; therefore no Preſcription can be againſt a Statute, becauſe it is the higheſt Record, unleſs it be ſaved by the ſame Statute; but an Affirmative Statute, as that of Wills, takes not away a Cuſtom; nor does a negative one, that is declarative of the Law, as that Leets ſhall be holden but twice in the Year.

Every Burgh is a Town, *non è converſo:* Tho' it be decayed, it ſends Burgeſſes. A Town is ſuch a Place as has, or has had a Church, Celebration of divine Service, Sacraments and Burials.

Of Villenage.

116. VIllenage is moſt properly when a Villein holds of his Lord, to whom he is Villein, certain Lands, to do him Villein Service, as to carry out the Dung, *&c.* and to do whatever is commanded by the Lord, *ubi ſcire non poterit veſpere, quale ſervitium fieri debet Mane.* And Freemen, by the Cuſtom of ſome Manors, hold by Villein Service, and their Tenure is Servile. Yet they are free, becauſe their Services are certain, tho' the Tenure be called Tenure in Villenage.

117. If a Villein purchaſe Land, Rent, or Common, or any Thing certain, the Lord ſhall have it; but he ſhall not have a Common uncertain, for it may be a greater Charge to the Ter-ten't; nor ſhall he vouch in reſpect of a Warranty made to his Villein; or ſue a Bond, or Covenant made to him, *&c.* becauſe Things in Action lie in Privity, and can't be transferred.

Leſſee L. Y. or W. of a Villein ſhall enter and

and hold to him and his Heirs a Villein's Purchaſe in Fee; but a Biſhop, that has a Villein in the Right of his Biſhoprick, ſhall hold the Villein's Perquiſite in Fee in the ſame Right; and a Husband, that has a Villein in Right of his Wife, ſhall have the Perquiſite in her Right. And if Executors that have a Villein for Years, enter into Land purchas'd by him in Fee, the Fee ſhall be Aſſets in their Hands. Co. Lit. 124b.

If Land be given in T. to a Villein, the Lord entring ſhall have a Fee determinable on the Villein's Dying without Heir of his Body, and the Fee abſolute is in the Donor; and tho' the Lord after infranchiſe him, yet his Iſſue ſhall not recover, for the Statute of *Donis* extends only to thoſe that have Ability to hold ſuch Eſtate. So if Land be given to an Alien in T. and K. enter, and then make him a Denizen.

If a Freeman take Land to hold by Villein Service, as to pay a Fine for the Marriage of his Daughter, *&c.* he ſhall pay ſuch Fine, and yet he remains free.

Every Villein is ſuch, either by Title of Preſcription, *viz.* that he and his Anceſtors have been Villeins Time out of Mind; or by his own Confeſſion in a Court of Record.

Every Court of Record is the King's Court, tho' the Profits may be another's; if the Judges of ſuch Court err, a Writ of Error lies; the Truth of its Records ſhall be tried by the Records themſelves. But the Proceedings of Courts-Baron may be denied, and tried by Jury, and a Writ of falſe Judgment, not of Error, lies on their

Judgments. And they can't hold Plea of Debt, or Treſpaſs, if the Debt or Damages amount to 40 *s.* or of Treſpaſs *quare Vi & Armis.*

The Iſſues born after ſuch Confeſſion are Villeins, thoſe born before are free.

118. If a Villein purchaſe Lands or Goods, the Lord ſhall have them, but if he alien them, or they deſcend, or eſcheat, or be recover'd *in ceſſavit*, before the Lord enters, he cannot enter, nor claim them, for he had only a Poſſibility before Entry, and neither *jus in re* nor *ad rem.* If the Villein be diſſeis'd, the Lord may enter; (*For his Right of Entry can't be taken away by the wrongful Act of the Diſſ'or*;) but he cannot enter after a Deſcent caſt, until the Villein has recovered the Poſſeſſion. If a Villein being Ten't T. diſcontinue, the Lord can't enter till the Iſſue has recovered *in Formedon.* If a Villein buy Goods real or perſonal, and ſell 'em, or make Executors, and die, before the Lord ſeiſes 'em, or if a Nief buy Goods, and take a Husband before the Lord ſeiſes the Goods, he can't ſeiſe 'em. But if the Lord ſeiſe Part in the Name of all, or claim the Goods within View, which amounts to a Seiſure, like the Claim of a Ward in View, this veſts in the Lord all the Goods that the Villein has or may have. *Note*; *Bona* Goods, ſignifies all Chattels real or perſonal.

119. But the K. may enter into Land purchas'd by his Villein, or ſeiſe his Goods, notwithſtanding ſuch Alienation; but he ſhall not have the meſne Profits of the Land, before

before the Office found, for his Title is by the Seiſure: But the Property of the Goods is in the K. before any Office or Seiſure.

If a Villein purchaſe a Rev'n, the Lord may come on the Land, and claim it, and by that Claim it is in him, for it can be claim'd only on the Land, and his Entry for this Purpoſe is no Treſpaſs; ſo if a Villein purchaſe a Rent, Common, *&c.*

If the Villein purchaſe an Advowſon, the Lord may come to the Church, and claim the Advowſon, and by ſuch Claim the Advowſon is in him; ſo if the Church become void, the Lord may preſent in his own Name, and gain the Inheritance, for tho' the preſent Avoidance be ſo far in the Nature of a Choſe in Action, that it can't be transferred by the Act of the Party, yet it is not merely a Choſe in Action, for the Husband may preſent to a Church become void in his Wife's Life.

A Preſentation is a Patron's Act offering 120.
his Clerk to the Biſhop to be inſtituted to ſuch a Church in theſe or the like Words, *Præſento vobis* A. B. *Clericum meum ad Eccleſiam de* D. This may be done by Word as well as by Writing, and if it be by Writing, it is no Deed, but in Nature of a Letter to the Biſhop, and therefore the K. may preſent by Word, as well as a common Perſon.

If the Perſon preſent for Money given by the Clerk, or any other for him, ſuch Inſtitution gains not the Advowſon, but is merely void by 31 *El.* 6. tho' the Clerk

knew not of it. And whereas at Law such Institution, *&c.* were only voidable, they are now absolutely void; and if a rightful Patron present Simoniacally, K. shall have the Term; but if an Usurper present Simoniacally, the rightful Patron shall present. And the Statute says, that from henceforth such Clerk shall be adjudged a disabled Person in Law, to have and enjoy the said Benefice, and this being an absolute and direct Law, and made for Suppression of Simony, the K. can't dispense with it by any Grant, with *Non obstante. And now by* 1 W. & M. Sess. 2. c. 2. *it is declared and enacted, That all Dispensations with* Non obstante *of any Statute are void, and that the Power of suspending Laws is illegal.*

A Villein is either Regardant, or in Gross; A Villein Regardant is, when one has a Manor, to which a Villein is Regardant, and he, or those whose Estate he has, have been seised of him and his Ancestors as Villeins and Niefs Regardant to the same Manor, Time out of Mind. Such Villein granted to another is in Gross, So if *A.* and his Ancestors have been seised of *B.* and his Ancestors as Villeins in Gross, *B.* is a Villein in Gross.

121. He that would have a Thing that lies in Grant by Prescription, must prescribe in himself and his Ancestors, not in himself and those whose Estate he has, for he cannot have their Estate without Deed, which must be shewn. But of Things regardant

or appendant, one may preſcribe, that he and thoſe whoſe Eſtate he has in the Manor or Land, to which ſuch Things are regardant, *&c.* have been ſeiſed of ſuch Things, as regardant or appendant to ſuch Manor, *&c.* Time out of Mind, becauſe the Manor, *&c.* might paſs without Deed; and tho a Man can't claim a Thing that lies in Grant by a *que Eſtate*, yet where it is but a Conveyance to the Thing claimed by Preſcription, a *que Eſtate* may be alledged of a Thing lying in Grant, as one may preſcribe that he and his Anceſtors, and all whoſe Eſtate he has in an Hundred, have Time out of Mind had a Leet, *for the Title to the Hundred is not in Queſtion, but whether the Leet be incident to the Hundred.* And the Plaintiff in Bar of an Avowry may alledge a *que Eſtate* in the Lord, *as* (*a*) *that* J. S. *whoſe Eſtate the Lord has in the Seigniory releas'd to him*, &c. *for if he, under whom the Lord claims, had no Title to the Services demanded, the Lord can have none, nor ſhall the Plaintiff be bound to ſhew the Conveyance he is not privy to.*

(*a*) Bro. *que Eſtate* 3.

Regularly, the Plaintiff or Demandant ſhall not entitle themſelves by a *que Eſtate*, *but the Ten't or Defendant may*, and ſo may the Plaintiff in Replevin after Avowry made, for thereby he becomes as Defendant. One may plead a *que Eſtate* of a Tenancy in T. or of an Eſtate L. if he aver the Life of Ten't in T. or Ten't L. *For at Law ſuch an Eſtate might have been gain'd by Occupancy.* But one cannot plead a

Bro. *que Eſtate* 1.

que

que Eſtate of a Leaſe Y. *in himſelf: Becauſe a Title to a Leaſe Y. cannot be had but by Grant of the Party, or Act of Law. Yet one may plead a que Eſtate of a Leaſe Y. in a* (*a*) *Stranger, becauſe he is not privy to his Title.* A Diſſ'or, *&c.* or any other in the *Poſt*, may plead a *que Eſtate.* But every Tenant that pleads it muſt alledge it in himſelf, and not in thoſe in the mean Conveyance from whom he claims.

(*a*) 1 Lev. 109. 3 Lev. 19.

Nothing but a Villein is ſaid to be Regardant to a Manor, *&c.* but an Advowſon, and other Things may be Appendant. Inheritances Appendant, or Appurtenant, are ſuch as belong to others more worthy. Appendants are always by Preſcription, but Appurtenants may in ſome Caſes be created at this Day; as if one grant to another and his Heirs Common of Turbary to be ſpent in his Manor, or Common in ſuch a Moor, for his Beaſts levant and couchant on his Manor, by ſuch Grant the Commons are appurtenant to the Manor. Both Appendants and Appurtenants are called in Latin *Pertinentia*, and paſs by the Grant of the Manor to which, *&c.*

If *A.* have a Manor to which the Royal Franchiſes of Waiſe and Stray are appendant, and convey the ſame to the K. the ſaid Franchiſes are thereby re-united to the Crown. But if K. grant the Manor in as large and ample a Manner as *A.* had it, *&c.* it is ſaid that the ſaid Franchiſes ſhall be appendant again, or rather appurtenant to the Manor.

Preſcrip-

Preſcription can't make Land appendant to Land, or Things incorporeal to Things incorporeal, but it may make Land appendant to an Office, or Advowſons, Villeins, Common, *&c.* to Land. But it can't make Eſtovers of Fewel to be burnt, or a Seat in a Church, appendant to Land, but only to a Houſe. Nor can it make a Leet, that is Temporal, appendant to a Church that is Eccleſiaſtical; for the Appendant and Thing to which, *&c.* muſt agree in their Nature.

The Thing to which another is appendant muſt be of perpetual Subſiſtence, therefore an Advowſon appendant to a Manor, is in Truth appendant to the Demeſnes, not to the Services. An Advowſon is appendant to the Manor of *D.* of which the Manor of *S.* is holden, the Manor of *S.* becomes Parcel of the Manor of *D.* by Eſcheat; the Advowſon is ſtill appendant to the Manor of *D.* only. Where a Corrody, which may be extinguiſh'd, was ſaid to have a Chamber Parcel of it, there he that had the Corrody had but his Habitation in it, as a Fellow of a College has in his Chamber. As for Offices in Fee to which Land may belong, they are in perpetual Subſiſtence, either being *in Eſſe*, or in that they are grantable over. 122.

If Parceners of a Manor, to which an Advowſon is appendant, make a Partition of the Manor without ſpeaking of the Advowſon, or make Compoſition to preſent againſt Common Right, yet it remains appendant; but if it be expreſly excepted upon

on the Partition, it becomes in Groſs.

There be four Kinds of Common of Paſture.

1. Common Appendant, which of common Right belongs to arable Land for Beaſts that ſerve for Maintenance of the Plough, as Horſes and Oxen to plough the Land, Kine and Sheep to compeſter it; and for ſuch Common, there is no need to preſcribe.

2. Appurtenant, for Beaſts not commonable, as Swine, Goats, *&c.* and this can't be had without Preſcription. Common Appendant, becauſe it is of common Right, ſhall be apportioned by the Commoner's Purchaſe of Part of the Land in which he hath ſuch Common; but common Appurtenant ſhall be extinct by the Commoner's Purchaſe of Part of the Land in which, *&c.* both Common Appendant and Appurtenant ſhall be apportioned by Alienation of Part of the Land to which the Common is Appendant or Appurtenant.

3. Common *par Cauſe de Vicinage*, which is but an Excuſe of Treſpaſs, and no Man can put his Beaſts into the Land in which he has ſuch Common, but they muſt eſcape thither themſelves, and either of the Parties that has ſuch neighbouring Grounds may encloſe againſt the other.

4. Common *in Groſs*, which belongs to no Land, and muſt be by Writing or Preſcription.

Some Commons are for a certain Number of Beaſts, ſome are certain only by Conſequence, as Common for ſo many Beaſts as

as are Levant and Couchant on ſuch a Manor, *&c.* Others are uncertain, as Common *Sans nombre in Groſs*, and yet in all theſe Caſes the Tenant of the Land muſt feed there too.

Common Appurtenant to Land is only for Beaſts levant and couchant thereon, and if he that has ſuch Common, put in other Beaſts, he is a Treſpaſſer. (a) *But he that claims the ſole Paſture of Land, or Paſture for a certain Number of Beaſts, may licenſe a Stranger to put in his Beaſts.* (a) 2 Saund. 327.

Common in one Manor appendant to another, is appendant to the Demeſnes, and not to the Services; therefore if any of the Tenancies eſcheat, the Lord ſhall not encreaſe his Common by Reaſon thereof. One can't preſcribe to have *Communiam Paſturæ*, or *Piſcariæ*, or *Liberam Piſcariam*, and exclude the Owner of the Soil, for it is againſt the Nature of a Common; but one may preſcribe to have *ſolam veſturam Terræ*, from ſuch a Day to ſuch a Day, and exclude the Owner of the Soil; (b) *but it has been queſtioned whether one can preſcribe to have* ſolam Veſturam, *or* paſturam Terræ *at all Times, ſo as wholly to exclude the Owner of the Soil from feeding there, but one may preſcribe to have* ſeparalem piſcariam, *and exclude the Owner of the Soil wholly from fiſhing, for he has ſtill the Profit of the Soil and the Water*, &c. (b) 1 Ven 1. 391. 1 Saund. 251. 2 Saund. 326.

The Diſſee of a Manor may preſent to a Church appendant before he re-enters into the Manor, but he can't uſe Common appendant,

pendant, becauſe it would be a Prejudice to the Ten't of the Land.

One may confeſs himſelf to be a Villein in a Court of Record, and thereby he becomes a Villein in Groſs. As if in a *Præcipe* brought againſt a Man, he confeſs himſelf to be a Villein to *A.* he is by this his Villein for ever, tho' the Demandant reply that he was free at the Time of the Writ, and the Jury find that he was ſo. In a *Nativo habendo*, if the Plaintiff offer to prove the Villenage by the Defendant's Kindred, and the Uncles of the Defendant, being examined in Court, confeſs themſelves Villeins to the Demandant, and this be enter'd on Record, they are made Villeins thereby for ever. But if one come into Court extrajudicially, and confeſs himſelf a Villein to *J. S.* he is not bound thereby, for the Court has no Authority to take his Confeſſion.

A Man that is a Villein is called a Villein, a Woman is called a Nief; and a Woman outlawed is ſaid to be wäiv'd, for ſhe is not ſworn to the Law, as Men are at the Age of twelve, or more, therefore ſuch are ſaid to be *Utlagati*, Women *Waiviatæ*, *id eſt*, *Derelictæ*.

123. If a Villein marry a Free-woman, their Iſſue is Bond; if a Free-man marry a Nief, the Iſſue is free, for Husband and Wife are one Perſon in Law, but by the Civil Law, *partus ſequitur Ventrem.* A Baſtard cannot be a Villein, unleſs he will confeſs himſelf ſuch, *quia nullius Filius eſt, for as he can receive no Benefit of his Parents by his Birth,*

Birth, ſo ſhall he have no Prejudice thereby. And tho' by Force of the ſaid Maxim he happen to be in a better Caſe than the lawful Iſſue, yet the Law will not make an Exception from it to the Prejudice of Freedom. A Baſtard is not ſuch a Son in Conſideration whereof an Uſe may be raiſed. A Child born more than nine Months after a Man's Death can't be reputed his Son.

A Villein may bring all Sorts of Actions againſt any but his Lord, but he can bring no Action againſt his Lord, whether he have an Eſtate of Inheritance in him, or only an Eſtate L. or Y. *&c.* But if the Lord make a Leaſe of his Villein, he may bring an Action againſt the Leſſor during the Leaſe: And a Villein may bring an Appeal of the Death of his Anceſtor againſt his Lord, and if it be found for him, he is infranchiſed; and by the general Purview of the Statutes, which give an Appeal of Rape, a Nief may have an Appeal of Rape againſt her Lord: But a Villein cannot have an Appeal of Robbery againſt his Lord.

A Villein, as Executor, ſhall have an Action of Debt againſt his Lord, and if the Lord take from him Goods which he has as Executor, he ſhall have an Action of Treſpaſs againſt the Lord, and recover Damages to the Teſtator's Uſe. And he is not infranchiſed by ſuch Action, if the Lord make Proteſtation that he is his Villein: But if he do not, the Villein becomes free, tho' the Matter be found for the Lord, and againſt the Villein: But a Proteſtation ſaves him 124.

him that takes it from being concluded by his Plea, if the Iſſue be found for him, (*a*) *and ſo it ſhall as it ſeems, tho' it be found againſt him, if he could not plead the Matter which he takes by Proteſtation*; as where one enters into Warranty and takes by Proteſtation the Value of the Land, this ſhall ſerve him as to the Value, albeit the Plea be found againſt him.

(*a*) Finch of Law, 359.

Co. L. 126. a.

125. Every Trial ſhall be from the Neighbourhood of a Town, Pariſh, Hamlet, Manor, Caſtle or Place known out of a Town, *&c.* as ſome Foreſts and ſuch like, within the Record, within which the Iſſue is alledged, which is the moſt certain and neareſt thereto; as if a Fact be alledged, in *K.'s Street, in parochia Mar. in civitate Weſtmon.* the Viſne ſhall come from *K. Street*, for being generally alledg'd, it ſhall be eſteem'd a Town; but if the Words had been *in quâdam platcâ vocatâ K. Street, &c.* it ſhould have come from the Pariſh, for no Viſne can come from a Street. Tho' a Pariſh may contain divers Towns, yet being generally alledged, it ſhall be intended to contain no more than one, unleſs the Party ſhew the contrary. If a Treſpaſs be alledged in *D. & nul tiel Ville* be pleaded, the Jury ſhall come *de corpore Comitatus*; *for to award the Venire to* D. *would be to prejudge the Queſtion.* If it be alledged in *D.* and *S. & nul tiel Ville de D.* be pleaded, it ſhall come from *S.* If a Manor be alledg'd in a Town, the Viſne ſhall be from the Town.

In

In a real Action, if one demand Land as Heir to his Father in one County, and alledge his Birth in another, and it be denied that he is Heir, it ſhall be tried where the Land lies; *for his being born of ſuch a Woman is not ſo material in this Caſe, as her being married to the Perſon from whom he claims, which may be preſum'd to be beſt known where the Land lies*; but if he demand Lands as *Son and* Heir to a Woman, *&c.* it ſhall be tried in the County where the Birth was alledg'd, *for if he can prove his Birth of ſuch a Woman, he muſt be her lawful Iſſue, whomſoever ſhe were married to, and the Preſumption of Law ſhall be in Favour of Legitimation.* So where Baſtardy is generally alledged, *mutatis mutandis.*

If one plead Letters Patents, and the other plead *non conceſſit*, it ſhall not be try'd where they bear Date, but where the Land lies, *for the Iſſue is not, whether ſuch Patents were made, (for they are Records, and cannot be denied,) but whether the Land paſs'd by 'em.*

When the Iſſue extends to a Place at Law, and to a Place in a Franchiſe, it ſhall be tried at Common Law.

Tho the *Venire* be awarded to the Coroners, where it ought not, or the Viſne come from a wrong Place, yet if it be done by Conſent, enter'd of Record, it is good.

But by 4 *&* 5 Annæ 16. Venires *out of the Courts at* Weſtminſter, *ſhall be* de corpore Comitatus, *except in Proſecutions criminal, and on Penal Statutes.*

In

In an Action againſt two, one pleads to the Writ and the other to the Action, the Plea to the Writ ſhall be tried firſt, for if it be found, it abates the whole Writ. In Treſpaſs, one pleads Not guilty, and the other a Releaſe, the Plea of Releaſe ſhall be try'd firſt, for if it be found true, the other Defendant ſhall take Advantage of it. But in real Actions one ſhall have no Benefit of the other's Plea; therefore, tho' the Plea of one go to the Whole, yet both ſhall be tried, for each Party may loſe his Part by this Miſ-plea. If there be an Iſſue for Part, and Demurrer for Part, the Court may direct the Trial of the Iſſue, or judge the Demurrer firſt at their Pleaſure.

126. An Iſſue is a ſingle, certain, and material Point, iſſuing out of the Allegations of both Parties.

Being taken generally, it refers to the Count, not to the Writ; as in Account, the Writ charges the Defendant generally, to be Receiver to the Plaintiff, the Count charges him eſpecially, as Receiver by the Hands of *T.* he pleads that he was not Receiver *modo & formâ*, this refers to the Count, ſo that he ſhall only be charged with the Receipt by the Hands of *T.*

An Iſſue ſhall not be joined on a Negative Pregnant, as *ne dona per le fait, which implies a Gift by ſome other Conveyance; ſo that the Court muſt be in Doubt, whether the Party ought to have Judgment, tho' the Iſſue be found for him.*

An

An Iſſue join'd on an *abſque hoc, &c.* ought to have an Affirmative after it, *i. e. he that traverſes the other's Plea, ought not to conclude*, hoc petit quod inquiratur per Patriam, *if he be Plaintiff, or* de hoc ponit ſe ſuper Patriam, *if he be Defendant; becauſe, perhaps the other Party may demur, but ſuch Concluſion ought to be made by him that pleaded the Matter travers'd, upon his Re-affirming of it.* Dy. 353. pl. 29.

An Iſſue regularly ought to conſiſt of an Affirmative and a Negative; and two Affirmatives ſhall not make an Iſſue, except in ſpecial Caſes, *as* (a) *where the Defendant pleads that the Plaintiff was born in* France, *and he replies that he was born in ſuch a Place in* England; *this is a good Iſſue, for if he ſhould traverſe the Birth in* France, *it could not be tried.* Sometimes an Iſſue is good, tho' the Affirmative and Negative be not in preciſe Words, as if in an Action of Debt for Rent by Leſſor Y. the Defendant plead that the Plaintiff had nothing in the Land at the Time of the Leaſe, and he reply, that he was ſeiſed in Fee. *For the direct Traverſe of the Plea*, viz. *That he had ſomething in the Land would not decide the Queſtion, for he might have an Intereſt as Leſſee W. and yet not be able to make a Leaſe Y.* (a) Co. Litt. 261. Cro. Jac. 312.

Some negative Pleas are Iſſues of themſelves, and he that pleads them, may conclude, *& hoc petit quod inquiratur, &c.* as where the Demandant counterpleads a Voucher, that neither the Vouchee nor his Anceſtors had any Thing in the Land, he ſhall

ſhall conclude *& hoc petit, &c.* or where one pleads in Avoidance of a Fine, *quod partes finis nihil habuerunt*, he may make the like Concluſion, *for either of theſe Pleas being found for him that pleads them, will make an End of the Matter; and the Affirmatives directly contrary to theſe Pleas*, viz. *that he and his Anceſtors had ſomething in the Land in the firſt Caſe*, or quod partes finis aliquid habuerunt *in the ſecond, are not only uncertain but immaterial, for if either he or any of his Anceſtors were ſeiſed in the firſt Caſe, or if either of the Parties to the Fine were ſeiſed in the ſecond, it is ſufficient:* So if the Ten't in a Writ of Dower pleads *nunques ſeiſieque* Dower, he ſhall conclude, *& de hoc ponit ſe ſuper Patriam, &c.*

Iſſue ſhall not be taken whether a Woman be with Child by her late Husband, for *Filiatio non poteſt probari.*

The Lord can't maim his Villein, (*i. e.*) diſable any Member of his Body, ſo as to make it unfit for Fighting, which can be expreſſed by no other Word but *Mayhemavit*,) becauſe the Life and Members of every Subject are under K.'s Protection, that they may ſerve him and their Country: And it is fineable for a Man to maim himſelf. If the Lord maim his Villein, the Villein can't have an Appeal of Maim againſt him, for in ſuch Action he can only recover Damages, which the Lord may take from him again, but the Lord ſhall be indicted for it, and grievouſly fin'd and ranſom'd.

Fine and Ranſom do both ſignify the ſame pecuniary Puniſhment, call'd a Fine, becauſe it makes an End for the Offence with K. a Ranſom, becauſe it redeems from Impriſonment, for regularly he that is fined, is impriſon'd till it be paid. Anciently he that was guilty of Maim, loſt the ſame Member, therefore the Writ was *Felonice Mayhemavit*, and tho' at this Day Damages only are recovered, yet the Word *Felonice* is retain'd. *By* 22 Ca. 2. 1. *Slitting the Noſe, or cutting off Noſe, or Lip, or cutting off, or diſabling any Limb, or Member, with Intent to maim, or diſfigure, is Felony without Clergy.*

An Amercement, in *Latin* call'd *Miſericordia*, differs from a Fine, in that a *Capiatur* ſhall not be awarded for it, as it ſhall for a Fine, and it ought to be aſſeſs'd moderately, and affeer'd by one's Equals, or elſe a Writ *de moderata Miſericordia* lies. The Reaſon why the Ten't or Defendant is amerc'd, is for his Delay in not rendring the Thing demanded at the Day, according to the Command of the Writ; and therefore if K. before Judgment, pardon the Delay, 127.
which is the original Cauſe of the Amercement, he diſcharges it, tho' he be not fully intitled to it before Judgment. If an Infant hanging the Plea come to full Age, he ſhall not be amerc'd, but for his Delay after his full Age.

And if the Plaintiff be *nonſuit*, or Judgment be given againſt him, he ſhall be amerc'd *pro falſo Clamore*; ſo ſhall he be amerc'd, where the Writ abates by his own Act

Act, but not when it abates by the Act of God. Thoſe that find no Pledges, ſhall not be amerc'd, as K. Q. *&c.*

There are ſix Sorts of Perſons diſabled to bring any Action, and if they do bring one, Judgment may be demanded if they ſhall be anſwered.

1. A Villein is diſabled to bring an Action againſt his Lord.

He that pleads in Diſability, ſhall but defend the Wrong and the Force, and ſhew how the Plaintiff is diſabled, and demand Judgment if he ſhall be anſwered. But one can neither plead in Diſability, or to the Juriſdiction, unleſs he make himſelf Party by this Part of the Defence. *Sed Q.*

(*a*) 3 Lev. 182. *For (a) the Defendant in Ejectment may plead that the Land is antient Demeſne, either with or without making any Defence,*

(*b*) 1 Lut. 9. *and ſo (b) it ſeems that a Man may plead other Pleas in Abatement without making any Defence; but the ſureſt Way is to plead* venit & defendit vim & injuriam, *without adding any more*; but after full Defence, (which is thus, *defendit vim & injuriam quando, &c. & damna, & quicquid quod*

(*c*) 1 Lut. 7. *ipſe defendere debet, or (c) thus,* defendit vim & injuriam quando, &c.) one cannot plead *in Diſability, nor* to the Juriſdiction. It is ſo neceſſary for the Defendant to make lawful Defence, that tho' he plead a good Bar without it, Judgment ſhall go againſt him If the Lord plead that the Plaintiff is his Villein, and it be found that he is free, and the Lord bring Error, this does not infranchiſe the Villein, nor needs the Lord

make Proteſtation, while the Record is in Force.

None at Law could ſue, or defend by Attorney, without Writ or Warrant ſo to do; but by one call'd *Reſponſalis* he might, in Caſe of Extremity, ſhew the Cauſe of his Abſence, and certify on what Trial he would put himſelf. And one may have an Eſſoin, or a Protection caſt for him by a Stranger. 128.

2. He that is outlaw'd, (as any one may be that is paſt the Age of 12, or has abjur'd the Realm, is diſabled to ſue an Action in his own Right, during the Outlawry, *&c.* but he may ſue *in autre Droit* as Executor, *&c.* and he may bring a Writ of Error to reverſe an Outlawry, he may likewiſe bring an Attaint by 23 *H.* 8. 3.

One that is outlaw'd in the County Palatine of Lancaſter *is diſabled to ſue at* Weſtminſter, *but* one outlawed in *Cheſter* or *Durham* is not, *for the former is a County Palatine by Parliament, the later by Preſcription only.* 1 Vent. 155.

When Outlawry is pleaded in Diſability, the Record muſt be ſhewed forth preſently, *ſub pede Sigilli*, unleſs it be in the ſame Court, but when it is pleaded in Bar, a Day ſhall be given to bring it in, if it be denied.

Judgment given by the Coroners in the County, does not diſable a Man, till the Exigent be return'd, and the Outlawry appear of Record.

Not only an Appearance in Deed, but a Purchaſe of a Superſedeas out of the Court

where the Record is, which is an Appearance of Record, avoids an Outlawry, whether it be delivered to the Sheriff before the *quinto exactus*, or after.

(a) 44 E. 3. 27. (a) If Outlawry be pleaded in Disability, *and the Plaintiff demand a Day to answer it, and before the Day purchase a Pardon*, he is restored by the Pardon.

Where the Ground of the Action is forfeited by Outlawry, it may be pleaded in Bar; as in Debt, Detinue, *&c.* but where the Ground of the Action is uncertain, and not forfeited by Outlawry, it can be pleaded in Disability only.

Process of Outlawry lies in all Actions *quare Vi & Armis*, by Common Law, and by Statute, in Debt, Detinue, Account, Covenant, Annuity, Case, *&c.*

Formerly any one might execute an Outlaw, now the Sheriff only, tho' he be outlawed for Felony.

129. 3. An Alien is disabled to bring any Action, and if he do, the Ten't or Defendant may plead that he was born in such a Country, out of K.'s Ligeance, and demand Judgment, *&c.* But it is not enough to say, that he was born out of the Realm, for one may be born out of the Realm, as in *Ireland*, *Jersey*, *&c.* and yet within K.'s Ligeance. *And the Child of a Merchant, living beyond Sea, is a natural Subject, tho' he be born beyond Sea.*

Vide sup. 2.

Cro. Car. 601.

Denizen either signifies a natural born Subject, or one privileg'd by K.'s Letters Patents; these may be either general, granting *quod ille in omnibus habeatur, reputetur, tractetur,*

tractetur, & gubernetur, tanquam ligeus noſter, &c. or they may be particular, enabling one to ſue only.

Ligeance is the faithful Obedience of a Liege Man, or Subject, to his Liege Lord or Sovereign. And *Ligeus* is ever taken for a natural born Subject.

Ligeance is either perpetual or temporary; the firſt is either by Birth, *quam nemo ejurare poteſt, nec Patriam exuere*, or by Grant of Naturalization, or Denization. The ſecond is either local, which laſts as long as an Alien lives under K.'s Protection, and makes him indictable of High Treaſon, *quod contra ligeantiæ ſuæ debitum, &c.* or limited, as when one is made a Denizen on Condition, or for Life, or in Tail *Male*, or *Special Tail*, &c. Vide ſupra 11.

An Alien being a Prior may ſue in Right of his Houſe, *and he may (a) ſue as Adminiſtrator*, &c. And an Alien, whoſe K. is in League with ours, may bring perſonal Actions in his own Right, tho' he can bring no real Action; but an Alien Enemy can bring neither a real nor perſonal Action, and if he do, the Ten't or Defendant may either plead in Diſability, or conclude to the Action. (a) Cro. Ca. 9.

4. Perſons attainted by Judgment againſt them on a Writ of *Præmunire* are diſabled to bring any Action, for by ſuch Judgment they are out of K.'s Protection, forfeit all their Lands in Fee-ſimple, and Goods, and are ſubject to Imprisonment for Life, and, in former Days, they might have been killed by any one, as being Enemies to K. 130. Alſo every one attainted of Treaſon or Felony,

lony, is disabled to sue any Action, for he is dead in Law.

There is a general Protection of K. which extends to all his Subjects, Denizens, and Aliens within the Realm, and is lost by Judgment in *Præmunire*: And there is a particular Protection by Writ, of which there are two Kinds.

The first is for the Safety of one's Person, and Possessions, from unlawful Violence, which is called a Protection *cum clausula nolumus*, from the Word *Nolumus* in the Writ, by which such Protection is granted; and this is no more than the Law implies in K.'s general Protection, and all Writs for such Protection, are of Grace, saving one, which a spiritual Person may, of Right, sue forth for himself, and his Farmers, that their Goods be not taken against their Will, by K.'s Ministers, *&c.*

The Second is for the staying of Suits, and is called a Protection *cum clausula volumus*, from these Words in the Writ by which it is granted, *volumus quod interim sit quietus de omnibus placitis & querelis.*

Of these Protections for the Staying of Suits, there are four Sorts. 1. *Quia Profecturus.* 2. *Quia Moraturus*, (*viz.* for one that is to go, or stay, beyond Sea, on K.'s Business.) 3. *Quia indebitatus nobis existit.* 4. *Quia imprisonatus ultra mare*, for one sent into K.'s Service, beyond Sea, who is imprisoned there.

As to the Protections *Profecturæ, & Moraturæ*, these nine Things are to be observed.

1. The

1. The Cauſe for which they are granted, muſt be ſet forth in the Writ, that it may appear to the Court that they are granted for the publick Good, and the Service of the Kingdom, either in War, or in Negotiations of Peace, *&c.*

2. They may be granted to Men within Age, and to Women in three Caſes, *quia lotrix, ſeu obſtetrix, ſeu nutrix*; but not to a Corporation Aggregate, becauſe it is inviſible. A Protection granted to the Huſband ſhall ſerve for the Wife. Vid. ſupra 109.

Regularly a Protection can be caſt only for the Ten't or Defendant, but not for the Plaintiff or Demandant, or one that is an Actor in Nature of a Plaintiff, as an Avowant, or the Garniſhee after Appearance, *&c.* But it may be caſt for a Vouchee, Ten't by Receipt, or Aid Prayer, when the Demandant has granted the Voucher, *&c.* whereby they are made privy. It may alſo be caſt for the Garniſhee, at the Day of the Return of the *Scire Facias* againſt him. But it cannot be caſt for an Officer of K.'s Receipt, or of a Court of Record whoſe Attendance is neceſſary.

A Protection caſt by one Defendant puts the Plea without Day for all, except in Treſpaſs, and Actions in the Nature of Treſpaſs, where each may Anſwer without the other; and in Treſpaſs, Protection for one ſerves for all if they join in Plea, or if they plead ſeveral Pleas, and one *Venire* is awarded againſt all.

3. By 13 *R.* 2. 16. *Protectio profecturæ* is not to be purchas'd hanging the Plea, ex-

cept for a Voyage Royal, but *Protectio Moraturæ* may.

A Protection can't be allow'd, but when the Party has a Day in Court, therefore it can't be caſt againſt any Writ of Execution, except a *Scire Facias.*

A Protection caſt at *Niſi prius* ſhall ſave a Default, tho' it be repeal'd before the Day in Bank, becauſe it was once well caſt; but if it be afterwards diſallow'd for Variance, the Default is not ſav'd.

Vid. infra 250.

If a Man have a Protection, and notwithſtanding plead a Plea, yet at another Day of Continuance it may be caſt.

Neither of theſe Protections ſhall endure more than a Year and a Day after the *Teſte*, if they are teſted 7 *Jan.* and allow'd *pro uno Anno*, the Re-ſummons ſhall be 8 *Jan.* the next Year, yet that is the laſt Day of the Year.

4. Theſe Protections muſt be to ſome Place out of the Realm, as *Scotland* or *Ireland*, *&c. Protectio quia moratur ſupra altum mare* is not good.

131. 5. Neither of theſe Protections are allow'd in Actions that touch the Crown, as Appeals of Felony or Mayhem; nor where the K. is ſole Party, nor where he and a Subject are Parties, nor in *Quare impedit*, nor Aſſiſe of Darrein Preſentment, for the Danger of a Lapſe; nor in *Quare non admiſit*, becauſe it is grounded on the *Quare Impedit*; Nor in Aſſiſe of Novel Diſſeiſin, nor in Certificate of Aſſiſe, becauſe it is grounded on Aſſiſe of Novel Diſſeiſin, which antiently was called *Feſtinum Remedium.* Nor in Dower *unde nihil habet*, becauſe

cauſe the Demandant has nothing to live upon.

An Infant was vouch'd, a Protection was caſt for him at the *Pluries venire facias ad habendum viſum*, and diſallow'd, for his Age muſt be judg'd by the Inſpection of the Court, *and the End of ſuch Proceſs is only to view him for that Purpoſe, and his bare Appearance is ſufficient to give the Court Satisfaction.* An Infant brought a Writ of Error on a Fine, and ſued a *Scire Facias* againſt the Conuſee, for whom a Protection was caſt, and the Court examined and recorded the Plaintiff's Age, and then allow'd the Protection, and the Nonage being recorded, the Heir of the Infant may reverſe the Fine; but if the Plaintiff had died before his Age had been inſpected, the Fine could never have been revers'd.

By 23 *H.* 8. 3. Protections are ouſted in Attaint; and by 1 *R.* 2. 8. In Actions for Victuals bought for the Service mention'd in the Protection, and in Pleas of Treſpaſs, *&c.* done ſince the Date of the Protection. And by the late Statutes, they are *generally* expreſly ouſted in perſonal Actions *given by the ſaid Statutes.*

If a Writ of Deceit be brought againſt one for caſting a Protection on an undue Surmiſe, the ſame Protection may be caſt again, *for it gives a general Freedom from all Suits, till the Time be elapſed.*

6. They muſt be under the Great Seal, and generally directed.

7. Any Court, (whether it be of Record or not,) wherein they are caſt, may allow or diſallow of them.

8. An Infant, *Feme* Covert, or Monk, may caſt a Protection, ſo may the Party himſelf, but if he caſt it himſelf, he ought to ſhew Cauſe why he ought to take Advantage of it, but a Stranger needs not ſhew any Cauſe.

9. They may be avoided three Ways. 1. On the Caſting of them before they are allow'd. 2. They may be diſallow'd afterwards for Variance betwixt them and the Record; or becauſe they lie not in the Action, or for that the Party has no Day to caſt them in. 3. If the Party go not to the Service for which they are granted, they may be repeal'd by *Innoteſcimus*; but, being Records, they can't be avoided by Averment.

The 3d Protection, *cum Clauſulâ volumus*, is for the King's Debtor; but now by 25 *E.* 3. 19. a Creditor may have Judgment againſt the King's Debtor; but he ſhall not have Execution unleſs he will take upon him to pay the King, and then he ſhall have Execution for the King's Debt as well as his own.

The fourth Protection, *cum Clauſula volumus* is *quia Impriſonatus, &c.* Neither this, nor the Protection laſt mentioned, have any certain Time limited in them.

132. 5. He that is profeſs'd of Religion in any Part of *England* is diſabled to bring any Action; but one profeſs'd in foreign Parts, is not diſabled, becauſe his Profeſſion cannot be tried by the Ordinary's Certificate, which is the only Trial allow'd of by Law in this Caſe.

A Man is ſaid to enter into Religion at his

his firſt Coming, and living under Obedience to the Rules of ſome Order, but he is not profeſs'd till he has taken the Vow. Vid. ſupra 142.

A Man profeſs'd is dead in Law, and his Heirs, Executors, and Adminiſtrators, repreſent him as if he were dead indeed. His Heir ſhall be bound by Warranty made by him, and ſhall have a Writ of *Mortanceſtor*, (and the Writ ſhall ſay, *ſi D. Pater, &c. die quo habitum Religionis aſſumpſit, in quo habitu Profeſſus fuit, &c.*) and if he be within Age, he ſhall be in Ward, as to Lands holden by Kt.'s Service. If one owe Money to the Abbot of *D.* and after becomes Abbot of *D.* he may ſue his own Executors. F. N. B. 196. a.

But if Ten't T. diſcontinue, and enter into Religion, his Iſſue ſhall not have a *Formedon* till his natural Death; for no Man by his own Act ſhall derogate from his own Grant. And if the Husband be profeſs'd, his Wife ſhall not be endow'd till his natural Death; and if ſhe alien Land which ſhe has in her own Right, and he be afterwards dereign'd, he ſhall avoid the Alienation; for the Wife ſhall have no Benefit by his entring into Religion, becauſe without her Conſent he would not have done it; but ſome have ſaid, that either Husband, or Wife, *ante Carnalem Copulam*, may enter into Religion without the other's Conſent, but after, they cannot without mutual Conſent. If a Diſs'or enter into Religion, and become profeſs'd, yet the Diſs'ee may enter; notwithſtanding the Land deſcends to the Heir of the Diſs'or,

for no one, by his own Act, ſhall prejudice a Stranger's Right.

The Head of a religious Houſe, tho' he be profeſs'd, may purchaſe, ſue, and be ſued for any Thing touching the Houſe.

If one profeſs'd be Executor, Biſhop, or Parſon, he may ſue in *autre Droit*. If he be K.'s Farmer, he may have an Action touching the Farm. If a Monk be beaten or impriſon'd, he and the Abbot may join in an Action, and the Writ may either conclude *ad damnum ipſius Prioris*, or *ipſorum*. In the ſame Manner if he be falſly and malicioufly indicted of Felony, they ſhall join in a Writ of Conſpiracy.

A Wife is diſabled to ſue, or be ſued, without her Husband, notwithſtanding the Husband be baniſhed for a Time, which
133. ſome call a Relegation; but the Wife of one that has abjur'd the Realm, or of one perpetually baniſh'd by Parliament, may ſue, or be ſued, as a *Feme Sole*, and ſhall recover her Lands alien'd by her Husband. *Note*;

That one can't be abſolutely baniſh'd, ſo as *perdere Patriam*, by any but by Parliament. K.'s Wife is an exempt Perſon from him, and may purchaſe, ſue, or be ſued, without him.

She can't be amerc'd, and therefore ſhall fin'd no Pledges.

(*a*) Q. 2 Inſt. 361. She ſhall not be (*a*) barr'd by Plenarty pleaded againſt her in a *Quare Impedit*.

She is not within 1 H. 4. 6. *which enacts, That in all Petitions to K. for Grants of Land, &c. Mention muſt be made of the Value thereof,*

of, and of what former Grants the Petitioners have had.

Her Bailiff, in an Action concerning the Hundred, ſhall ſay, *in contemptum Domini Regis & Reginæ.*

She pays no Toll, nor is ſhe bound by the Statute of *quia Emptores* to diſtrain *pro Rata*; nor is ſhe within the Statute of *Marlbridge, cap.* 4. which prohibits the Driving a Diſtreſs into another County.

It is Treaſon to compaſs her Death, and none can marry the Queen Dowager without K.'s Licence.

But K.'s Wife ſhall be ſued by a *Præcipe*, not Petition, and a Protection ſhall be allow'd againſt her, but not againſt K.

6. A Perſon excommunicate is diſabled to ſue any Action, and if he do bring any, the Ten't or Defendant may plead that he is excommunicated, and ſhew the Biſhop's Letter, under his Seal, witneſſing the Excommunication, and demand Judgment if he ſhall be anſwered. But a Man ſhall not be diſabled by Excommunication pronounc'd by any foreign Biſhop; nor ſhall one excommunicate by an *Engliſh* Biſhop, be diſabled to bring an Action againſt the ſame Biſhop. 134.

There is the greater, and the leſſor Excommunication; the greater excludes a Man from the Communion of the Faithful, as well as of the Sacraments: The leſſor excludes a Man from the Communion of the Sacraments only: But either of them diſables the Party.

A Corporation Aggregate can't be diſabled

bled by Excommunication of the Members, for the Body Politick, *which is the Plaintiff, reſts only in Conſideration of Law, and can't be excommunicate*, and can only appear by Attorney. But where the Plaintiff is excommunicate, he is diſabled to ſue either in his own Right, or another's, as Executor, Parſon, *&c.* for they which converſe with one excommunicated, are excommunicated alſo.

Anciently an Official might certify an Excommunication, but now none can certify it but the Biſhop himſelf, (unleſs he be beyond Sea,) or one that has ordinary Juriſdiction, and is immediate Officer to the King's Courts, as Arch-deacon of *Richmond*, or Dean and Chapter in Time of Vacation.

Biſhop's Certificate under his Seal remains good after his Death; but a Certificate by a Biſhop, that another Biſhop has certified him that the Party is excommunicate, is not good.

None but the King's Courts of Record, as King's Bench, Common Pleas, Juſtices of Gaol Delivery, and the like, can write to the Biſhop to certify any Eccleſiaſtical Matter. But no inferior Court, as of *London*, or any other Corporation, can do it, but the Plea muſt be removed into the Common Pleas, and that Court ſhall write to the Biſhop, and remand the Plea. For this Cauſe, Conuſance ſhall not be granted in a *Quare Impedit:* And a *Quare Impedit* of a Church in *Wales* did lie in the County next adjoining, becauſe the Lordſhips Marchers could not write to the Biſhop. *But K.'s Juſticiar in* Wales *had Power to write to the*

Cro. Car. 342. Vaug. 411.

the Biſhop, therefore a Quare Impedit *for Churches in the antient Shires, which were within his Juriſdiction, did always lie in* Wales.

If the Excommunication pleaded can't be denied, the Writ ſhall not abate, but Judgment ſhall be that the Ten't or Defendant ſhall go quit without Day, and when the Plaintiff is abſolv'd, he ſhall have a Reſummons or Re-attachment, and bring the Defendant into Court again; (ſo ſhall he alſo where the Plea is put without Day for other Cauſes, as *Non venue* of the Juſtices, Protection, Eſſoin *de Service le Roy, &c.*) But in all the other five Caſes, where Diſability is pleaded, the Writ ſhall abate, if the Matter pleaded can't be gainſaid. Vid. ſupra 191.

Dies in Law is the Day of Appearance of the Parties, or the Continuance of the Plea.

In real Actions there are *dies Communes*, for which ſee the antient Statutes. Marl. 12. 32 H. 8. 21. 16, 17 C. 1. 6.

In all Summons on the Original, the Party muſt be ſummon'd 15 Days before the Day of the Return of the Original, and the Statute of *Articuli ſuper Cartas, ca.* 15. which requires that in all Summons, and Attachments, in Plea of Land, there ſhall be contain'd the Term of 15 Days, was in Affirmance of the Common Law. Vid. 2. Inſt. 567.

If the Original be return'd *Tarde*, (*i. e. delivered to the Sheriff ſo late that he had no Time to ſerve it,*) in which Caſe an *Alias Summoneas* goes forth, there muſt be nine Return-days incluſively between the Teſte and Return thereof, as there muſt be in all other

other judicial Proceſs in real Actions. But if one demand Conuſance of Pleas to be holden within his Manor, Proceſs ſhall be awarded there from 3 Weeks to 3 Weeks.

K.'s Bench may proceed *de die in diem*, when the Offence is committed in the County where they ſit, but when it is remov'd by *Certiorari*, there muſt be 15 Days between every Proceſs, and the Return thereof.

2. There is *Dies Specialis*, as in an Aſſiſe, in either Bench, there needs not be 15 Days after the Attachment, before the Appearance; but before Juſtices aſſign'd, there muſt; and generally in Aſſiſes the Juſtices may give any ſpecial Day out of Term as well as in Term. And in Aſſiſe, if the Parties be adjourn'd to a common Day, as *Quindenam Paſch. &c.* they are not demandable till the fourth Day after, but when they are adjourn'd to a certain Day of the Week, as *Monday*, *Tueſday*, *&c.* they are demandable on that very Day.

Upon an Imparlance, or after Demurrer, the Court may give any ſpecial Day, ſo it be in Term. In a *Scire Facias* on a Fine, or Recovery in a real Action, becauſe they are Writs of Execution, and in all judicial Writs, Proceſs againſt an Infant to judge of his Age, Proceſs when the Husband prays in Aid of his Wife, or *Pone* at the Defendant's Suit, there need not be 15 Days.

135. 3. There is *Dies Gratiæ*, which is regularly granted by the Court, at the Prayer of the Plaintiff, or Demandant, but never at the Prayer of the Ten't or Defendant; but this

this ſhall never be granted where K. is Party by Aid Prayer, or when a Peer is Ten't or Defendant. Sometimes the Day that is *quarto Die poſt*, is call'd *Dies Gratiæ*, for no Default is recorded till that is paſt, except in a Writ of Right; but in all Caſes the very Day of Return is the Day in Law, and to that the Judgment has Relation.

Where a Man by not appearing will be ſubject to great Loſs, as of Iſſues, or his Freehold, or to corporal Pain, as Impriſonment, he may appear on the Day which he has by the Roll, *on which the Writ was awarded*, tho' the Sheriff return not the Writ.

The Day of *Niſi Prius*, and the Day in Bank, are eſteem'd in Law as one Day, for ſome Purpoſes; *e. g. If the Defendant make Default at* Niſi Prius, *and an inſufficient Protection be caſt for him, by Reaſon whereof the Inqueſt is not taken, and at the Day in Bank the Protection be diſallow'd, the Inqueſt ſhall be there taken for Default, whether the Defendant appear at the Day in Bank, or not, but without ſome ſuch ſpecial Reaſon, the Law looks on them to be diſtinct Days, as they really are.* Vide ſupra 195. Bro. Inqueſt, 23.

There are *Dies Juridici, & Dies non Juridici*, all Days in Term are *Dies Juridici*, but no Days out of Term, (except it be in Aſſizes.) All Sundays, Aſcenſion-Day, Purification, All-Saints, All-Souls, and St. *John* Baptiſt's Day, are *Dies non Juridici.*

The natural Day contains the Space of 24 Hours, from 12 at Night to 12 the next; therefore in Indictments of Burglary the Offence is ſaid to be committed *in [Nocte ejusdem*

ejusdem Diei. 91 Days make a Quarter of a Year by legal Computation, and 182 Days make Half a Year, for the Law reckons not the odd Hours. (*a*) In the Leap-Year the Day encreasing, and the Day next precedent, shall be reckoned but as one. Regularly 28 Days are accounted a Month in Law, except it be as to the accounting of a Lapse in *Quare Impedit*, in which Case the Law computes by Kalendar Months.

(*a*) Vid. 21 H. 3. Sta. de anno Bis-sextili.

A Leper, remov'd by the Writ *de Leproso amovendo*, may sue, but he must appear by Attorney; and an Ideot, Madman, *&c.* may at this Day bring an Action in their own Names, and prosecute it by others. An Infant may sue by Guardian, or Prochein Amy, *by W.* 2. 15. but he shall defend by Guardian only.

136. If a Villein become a Monk profes'd, the Lord can't take him out of the House, but he shall have an Action against the Sovereign of the House. But if such Villein be afterward deraign'd, the Lord may seise him again; and he may seise a Secular Priest being his Villein, notwithstanding his Holy Orders. The Marriage of a Secular Priest at Law was not void, but voidable by Divorce, which if it were not had in the Life of the Parties, could not be after the Death of either of them. But the Marriage of a Man or Woman profes'd was wholly void, and the Issue Bastards.

And if a Nief be married without Licence, she is infranchised during the Coverture, and the Lord can't seise her, but he may have an Action against the Husband;

band; and if ſhe were Regardant, and the Lord make a Feoffment of the Manor to which, *&c.* and the Husband die, the Feoffor ſhall have the Nief; for during the Coverture ſhe was ſevered from the Manor, *and the Lord's Intereſt in her was rather in Nature of a Poſſibility, than of a Reverſion.*

K. may infranchiſe a Villein by making him a Knight, but the Lord may have an Action againſt them that were the Means thereof.

If the Heir of Land holden by Kt.'s Service had enter'd into Religion before his Age of 14, the Lord ſhould have had a Writ of Raviſhment of Ward againſt the Sovereign. But the Land ſhould have deſcended to the next Heir, and the Lord had no Remedy as to the Loſs of the Land, for it was *damnum abſque injuria.* 137. 4 H. 4. 17.

Manumiſſion is properly when the Lord makes a Deed to his Villein to infranchiſe him; but there are alſo many implied Manumiſſions, as Knighthood, *&c.* If a Villein remain in antient Demeſne a Year and a Day, the Lord can't ſeiſe him there. If he be a Prieſt in K.'s Chapel, he can't ſeiſe him in K.'s Preſence.

If the Lord make an Obligation, or Leaſe Y. to his Villein, or infeoff him, or do any Act that transfers a fix'd Eſtate, or gives a Cauſe of Action to the Villein, he thereby infranchiſes him. But if the Lord bring an Appeal of Felony againſt his Villein who has been indicted of the ſame before, he does not infranchiſe him thereby, for he cannot have him hang'd without it, and 138.

and if the Villein be acquitted on the Appeal in that Caſe, he can't recover Damages againſt the Lord. But if the Villein againſt whom the Lord brings ſuch Appeal were not indicted before, and acquitted on the Appeal, he ſhall be free, becauſe *W.* 2. 12. gives Damage to the Appellee not indicted before, which in this Caſe would be illuſory, if the Villein would ſtill continue ſuch.

If the Lord make a Leaſe W. to his Villein, or make a Releaſe unto him, having nothing in the Land, which is merely void, or attorn to a Grant made unto him, *which tranſfers nothing from the Lord, but only makes good another's Grant*, he does not infranchiſe him thereby.

If Ten't T. of a Manor, to which a Villein is regardant, infeoff the Villein of the Manor, the Iſſue may bring a Formedon againſt the Villein without infranchiſing him, for he can't ſeiſe him till he has recover'd the Manor. So if the Ten't of Kt.'s Service Land had infeoff'd the Villein and another on Colluſion, the bringing of a Writ of Ward againſt them did not infranchiſe him, for if the Lord ſhould have entered for the Moiety belonging to his Villein, his Seigniory would have been ſuſpended, and he could not have a Writ of Ward againſt the other, *in reſpect of the Lord's actual Seiſin of the ſaid Moiety.* If the Lord levy a Fine to a Villein of Land in ancient Demeſne, this infranchiſes him, tho' it be afterwards revers'd by a Writ of Deceit, for it was not void, but voidable.

If

If the Lord bring an Action real or perſonal againſt his Villein, and recover, or be nonſuit after Appearance, he thereby infranchiſes him, becauſe he might impriſon him, and ſeiſe his Goods without Suit; but if the Lord be nonſuit before Appearance, the bare bringing of the Writ does not infranchiſe the Villein, (*a*) *becauſe a Stranger may bring it in the Lord's Name.* (*a*) Vid Co. L. 145. a.

Nonſuit is always when the Demandant, or Plaintiff, ſhould appear, and makes Default. A Retraxit is when he is preſent in Court; (as regularly he is ever, by Intendment of Law, till a Day be given over, unleſs it be when a Verdict is to be given, and then he is but demandable;) and this is either Privative, when the Entry is, *quod ſolenniter exactus non venit, ſed a ſecta ſua in contemptum Curiæ ſe Retraxit, &c.* or Poſitive, when the Entry is, *quod fatetur ſe, ſeu cognoſcit ſe, ulterius nolle proſequi, &c.* It is called a Retraxit, becauſe that is the effectual Word, uſed in the Entry. It is a Bar to all Actions of like Nature or inferior. 139.

Nonſuit before Appearance is never Peremptory, and regularly alſo Nonſuit after Appearance is not, but in a *Quare Impedit* it is, and in that Action a Diſcontinuance is alſo Peremptory, becauſe the Defendant ſhall have a Writ to the Biſhop. Nonſuit after Appearance is alſo Peremptory in a *Nativo habendo*, and the Nonſuit of one Plaintiff in that Action nonſuits both, *in favorem Libertatis*; for in a *Libertate Probanda*, ſuch Nonſuit is not Peremptory, neither is the Nonſuit of one Plaintiff the Nonſuit

Nonſuit of both. And it is Peremptory not only in an Appeal of Felony, but of Mayhem alſo, for the Words therein are, *Felonice Mayhemavit*; but the Nonſuit of the Plaintiff in an Appeal is not ſuch an Acquittal on which the Defendant ſhall recover Damages againſt the Abettors, by W. 2. 12. *unleſs, after the Nonſuit, he were arraigned at K.'s Suit upon the Appeal, and acquitted.* Such Nonſuit is alſo Peremptory in an Attaint, but a Diſcontinuance in an Attaint is not, becauſe there is a Judgment given upon the Nonſuit, but not upon the Diſcontinuance.

2 Inſt. 385.

In perſonal Actions brought by any but Executors, the Nonſuit of one Plaintiff is the Nonſuit of all; except in an *audita Querela*, which is favour'd, becauſe it diſcharges a Man from Execution; but in real or mix'd Actions, the Nonſuit of one Demandant is not the Nonſuit of both, but he that made Default ſhall be ſummon'd and ſever'd.

One may be ſevered two Ways. 1. By Summons *ad ſequendum Simul*, where he never appear'd. 2. By the Court's Award of Nonſuit without any Summons, and this is always after Appearance.

In a real Action by ſeveral *Præcipes* againſt two or more, Nonſuit as to one, is a Nonſuit as to all, becauſe as to the Demandant it is all but one Writ under one Teſte.

Writs of Error, Attaint, *Scire facias*, *&c.* follow the Nature of thoſe Actions whereon they are grounded.

K. can't

K. can't be Nonſuit, but the Attorney General may enter an *ulterius non vult Proſequi*, but an Informer *qui tam, &c.* may be Nonſuit.

After Demurrer join'd, the Plaintiff may be Nonſuit, but by 2 *H.* 4. 7. at a Day given by the Judges to be adviſed after Verdict, he ſhall not.

After an Award to account, the Plaintiff may be Nonſuit, becauſe it is but an Interlocutory, and no final Judgment.

A Lord can't preſcribe to have a Fine of every Ten't that marries his Daughter without his Licence, for it is againſt the Freedom of a Freeman that is not bound thereto by a particular Tenure; but there may be a Cuſtom in a Manor that every Ten't that holds in Bondage, the Freehold being in the Lord, ſhall pay ſuch Fine, tho' his Perſon be free. 140.

But Gavelkind ſtands with ſome Reaſon, for every Son is a Gentleman alike, and *Burgh Engl.* has its Reaſon, for the youngeſt is leaſt able to take Care of himſelf. In ſome Manors the eldeſt Daughter or Siſter alone ſhall inherit; and in ſome Gavelkind extends to Brothers as well as Sons.

A Man can't preſcribe to diſtrain Cattle Damage-Feaſant, and detain 'em till ſatisfied for the Damage at his Will; for it is againſt Reaſon that he ſhould be Judge in his own Cauſe. Therefore a Fine levied before the Bailiffs of *Salop* was revers'd, becauſe one of them was Party to the Fine. 141.

K. *John*, and his Son *H.* aboliſh'd the *Iriſh* Cuſtoms, and made the Laws of *England*

land in Force there; it is ſaid, that our Statutes bind them not, *quia non habent Milites in Parliamento, and this is true as to all thoſe in which* Ireland *is not particularly named:* But by *Poyning*'s Law, all Statutes made in *England* before the 10th Year of *H.* 7. are of Force in *Ireland.*

Of Rents.

OF Rents there be three Sorts. 1. Rent-Service. 2. Rent-Charge. 3. Rent-
142. Seck. To which may be added Rent reſerv'd on a Leaſe W. called Rent diſtreinable of common Right, which is not properly Rent-Service, becauſe Fealty, which is incident to all Rent-Service, is not incident to it; Rent is reſerv'd out of the Profits of the Land and is not due till they are receiv'd. It may by Act of Law iſſue out of Services, as a Seigniory does out of a Meſnalty immediately, and mediately from the Land. Any Thing may be reſerv'd that lies in Render, Office, or Attendance, but not the Profits themſelves.

One can't diſtrain for Rent by Night, but for Damage-Feaſant one may.

Rent-Service is where Ten't in Fee holds of his Lord, or Donee, or Leſſee L. or Y. hold of him in Reverſion by Rent, and it is ſo called, becauſe Fealty is incident to it. Where the Eſtate on which it is reſerv'd may paſs without Deed, it may be reſerv'd without Deed.

No Rent reſerv'd at this Day on a Giſt, or Leaſe, is a Rent-Service, unleſs the

Rev'n be in the Donor or Leſſor; but it needs not be immediately expectant on the Eſtate of the particular Ten't in Poſſeſſion. And, before the Statute of *quia Emptores*, if one had made a Feoffment in Fee, or a Leaſe L. Rem'r in Fee, reſerving Rent, ſuch 143.
Rent had been a Rent-Service. And if he had made no Reſervation, the Ten't ſhould have holden of him by the ſame Services by which he held over.

Fealty is an Incident inſeparable from the Rev'n, but the Rent is ſeparable.

If a Man at this Day reſerve to him and his Heirs a Rent upon a Feoffment, or any other Conveyance, whereby the whole Eſtate in Fee paſſes, with a Clauſe, That it ſhall be lawful for him and his Heirs to diſtrain, ſuch Rent is a Rent-Charge, becauſe the Land is charged with ſuch Diſtreſs by Force of the Writing only, and not of common Right. If it be to the Value of the 4th Part of the Land, or more, it is called a Fee-Farm.

If one ſeis'd of Land grant a Rent out of 144.
it in Fee, T. L. *&c.* with a Clauſe of Diſtreſs, ſuch Rent is alſo a Rent-Charge: But whether a Rent be reſerv'd on a Feoffment, or granted by the Ten't out of Land, if there be no Clauſe of Diſtreſs, it is a Rent-Seck, and remedileſs, unleſs the Feoffor or Grantee can gain a Seiſin thereof.

If a Rent be granted payable at 4 Feaſts, and that for Default of Payment on Demand it ſhall be lawful to diſtrain; in this Caſe, a Demand made by the Grantee after any of the Days is good to enable him to diſtrain,

but

but where a Re-entry is reſerved for Non-Payment of Rent on Demand, on ſuch a Day, the Demand muſt be made on the very Day.

Rent can't be reſerv'd, or granted out of an incorporeal Inheritance, and it can only be reſerv'd on a Conveyance by which an Eſtate paſſes, and therefore it can't be reſerv'd on a Releaſe by Diſs'ee to Diſs'or. But it may be claimed by Preſcription.

Vide ſupra 72.

It is ſaid that a Rent may be reſerv'd on a Feoffment by Deed Poll, becauſe the Words, by which it is reſerv'd, are the Words of the Feoffor, and the Feoffee agrees to it by accepting of the Deed, and for this Cauſe a Writ of Annuity will not lie for ſuch Rent, whether it were reſerv'd by Deed Poll, or indented, nor will it lie for Rent granted for Owelty of Partition, (for *it is meerly in the Realty, and* is in Nature of the Land deſcended.) Nor for any other Rent which might at Law have been granted without Deed, as Rent granted to a Woman in lieu of her Dower, whether it be granted by Deed or without, *becauſe ſuch Rents are granted in lieu of a Right which the Grantee has to the Land by Act of Law, and therefore are veſted in the Grantee in ſuch Plight as the Land did, or ought to have done.*

Vid. Co. L. 169.

An Annuity is a yearly Payment of a certain Sum in F. T. L. or Y. charging the Grantor's Perſon only; and not only the Grantee in Fee, but his Heirs, and Aſſigns, may have a Writ of Annuity againſt the Grantor, but not againſt his Heir, unleſs

he be ſpecially named in the Grant. A Grant of Annuity by two gives but one Action againſt both, unleſs there be the Words, *obligamus nos & utrumque noſtrum*, in the Grant, which gives an Action againſt either of them, but one Satisfaction only.

The Grantee of a Rent-Charge has his Election to bring a Writ of Annuity againſt the Grantor, or to diſtrain for the Arrears of the Rent. For where-ever a Man has two Remedies for the ſame Thing, he may chuſe either of them. And if the Ten't of the Land, and a Stranger grant a Rent out of the Land, tho' this be *prima Facie*, the Grant of the one, and the Confirmation of the other, yet the Grantee may *either diſtrein for the Rent, or* have a Writ of Annuity againſt both. But if the Grantee of a Rent-Charge bring a Writ of Annuity and count thereon, he can afterwards bring a Writ of Annuity only; ſo if he diſtrein for the Rent, and avow for it in a Court of Record, or bring an Aſſiſe for it, and make a Plaint thereon, his Election is determin'd, and he can afterwards take it only as a Rent; for *Electio ſemel facta non patitur regreſſum*. If a Rent-Charge be granted to *A.* and *B.* and their Heirs, *B.* diſtrains, and avows for himſelf, and makes Conuſance for *A.* and dies, this binds *A.* ſo that he can never after have a Writ of Annuity. But where a Man may have an Action of Account, or Debt, and brings an Action of Account, and is Nonſuit therein after Appearance, he may have Debt, for both Actions charge the Perſon only.

The Election of either Remedy is a Bar to the other, because they differ in Nature, one being real, the other perſonal.

If the Wife of the Grantee of a Rent in Fee bring a Writ of Dower againſt his Heir, he cannot plead in Bar of her Dower, that he claims it as an Annuity, for he can't determine his Election by Claim, but by ſuing a Writ of Annuity, neither can he have it as an Annuity for the 2 Parts, and a Rent for the 3d.

As to Elections, theſe Things are to be obſerved.

145. 1. Where no Intereſt paſſes to a Grantee before Election made by him, (*as where I grant to a Man one of my Horſes in my Stable,*) the Election muſt be made in the Life of the Parties, or the Grant becomes void by his Death.

2. But where an Intereſt paſſes, as when one Thing is granted, and the Grantee has Election to take it one Way or another, (*as*
2 Rep. 36. *by way of Uſe executed by the Statute or Conveyance at Common Law,*) there the Election may be made by the Heir or Executor.

3. Where an Election is given to ſeveral Perſons, Election firſt made by any of the Parties ſhall ſtand.

4. Where an Election is given of two ſeveral Things, he that is to do the firſt Act ſhall have the Election; as if one grant an Annuity, or a Robe yearly, or make a Leaſe reſerving a Rent of 20 *s.* or a Robe yearly, *&c.* the Grantor or Leſſee, becauſe they are to be the firſt Agents, by Payment of the one, or Delivery of the other, may chuſe to pay either of them; but if I give you one of my Horſes in my Stable, or 20 Loads of Wood to be taken in ſuch a Place,

you

you may chuſe which you like beſt, for in this Caſe I am not to be the firſt Agent by Delivery of them, but you, by taking of them.

5. He that has ſuch Election may often loſe it by his own Default; as if *A.* grant to *B.* 20 *s.* or a Robe, to be paid once at ſuch a Feaſt, and fail of Payment at the Day, *B.* may bring his Action for either; ſo if he infeoff *B.* of two Acres, to hold the one for Life, the other in Fee, and *B.* before he has made Election to have a Fee in one of them, make a Feoffment of both, the Feoffor may re enter into either of them for the Forfeiture. But if one grant an Annuity, or a Robe, payable at the Feaſt of *Eaſter*, for Y. L. T. or in Fee, and fail of Payment, the Grantee ſhall not have his Election of either of them, but muſt bring his Writ of Annuity in the Disjunctive, for if he ſhould bring it for one of them without mentioning the other, the Grantor would *in this particular Caſe* loſe his Election for ever after, becauſe after Judgment once had on a Writ of Annuity, the Grantee can't have a Writ of Annuity afterwards, but only a *Scire Facias* on the ſaid Judgment; *yet it ſeems that if a Leſſor reſerve yearly a Rent, or a Pair of Spurs, and the Leſſee fail of Payment at the Day, the Leſſor may diſtrain for either of them, for in this Caſe the Leſſee loſes his Election only* Pro hac Vice. 1 Ro. A. 725. Co. L. 90. b.

Wherever Goods are diſtrain'd, the Owner may either replevy them by Writ, which is by Common Law, or by Plaint, which

was given by *Marlbridge* 21. and tho' one grant a Rent with a Clauſe of Diſtreſs, and grant further that the Diſtreſſes taken ſhall be Irrepleviſable, yet may they be replevied, for ſuch a Reſtraint is againſt the Nature of a Diſtreſs, and no private Man can alter the common Courſe of Law.

To replevy Goods is to deliver them to the Owner upon Pledges to proſecute, (which are required by Common Law,) and alſo Pledges to make a Return of the Things diſtrained, if Judgment ſhall be againſt him that brings the Replevin, which are required by *W.* 2. 2.

The Sheriff may take a Plaint, by Force of the ſaid Act, out of the County-Court, and make Replevin preſently, for it would be inconvenient to ſtay till the County-Day.

He that brings a Replevin muſt either have an abſolute Property in the Goods diſtrain'd, or at leaſt a ſpecial Property, as in Goods taken to manure the Land, and ſuch like: And if the Beaſts of ſeveral Men be taken, they can't join in a Replevin. If the Villein's Goods be diſtrain'd, the Lord may replevy them; but if they be taken by a Treſpaſſer, *claiming a Property in them*, he can't replevy them, becauſe the Villein had but a Right.

Fitz. Replevin 43. If the Defendant upon Plaint made claim Property, the Sheriff can't proceed, but the Plaintiff muſt ſue a Writ of *Proprietate Probanda*, (becauſe Property can't be tried but by Writ,) and if it be found thereupon for the

the Plaintiff, the Sheriff muſt deliver the Diſtreſs to him; but if it be found for the Defendant, the Sheriff can do nothing. But this being but an Inqueſt of Office, the Plaintiff may afterwards replevy by Writ; and if the Sheriff return the Claim of Property, it ſhall be put in Iſſue, and determined in the Common Pleas.

None can claim Property in a Replevin by his Bailiff, or Servant, becauſe he ſhould be fined for his Contempt, if it be found againſt him, which can't be done in this Caſe, becauſe *nemo punitur pro alieno delicto. But this muſt be underſtood where Replevin is by Plaint in the Country, in which Caſe a falſe Claim of Property is fineable, in reſpect of the Delay, but one may claim a Property in a Court of Record by a Bailiff.*

If the Ten'ts Cattle be diſtrain'd, and the Meſne who is bound to acquit him, put in his Cattle in lieu of the Ten'ts, he ſhall bring a Replevy for them, tho' they were not diſtrain'd. 1 Lev. 90.

If one grant a Rent-Charge with a *Proviſo*, that neither the ſaid Grant, nor any Thing therein contained, ſhall charge his Perſon with a Writ of Annuity, by ſuch *Proviſo* the Land only is charged. And tho' there be two Negatives in ſuch *Proviſo*, yet they ſhall not make an Affirmative againſt the manifeſt Intent of the Party. But a *Proviſo* that would take away the whole Effect of the Grant, as if one grant a Rent out of Land in which he has nothing, provided that it ſhall not charge his Perſon, is 146.

void. So is a *Proviſo* that is repugnant to the expreſs Words of the Grant; as where one grants a Rent-Charge out of Land, provided that it ſhall not charge the Land; and where a *Proviſo* is good at firſt, and afterwards it happens that the Grantee, or his Executors, can have no other Remedy but that which was reſtrain'd, they ſhall have it notwithſtanding ſuch Reſtraint; as if *A.* grant a Rent to *B.* for L. with a *Proviſo* that it ſhall not charge his Perſon, yet *B.*'s Executors ſhall have an Action of Debt for the Arrears during *B.*'s Life.

By a Publ. Act. The Executors have a double remedy either to distrain, or by bringing an Action of Debt, tho' the Grantor's Person cannot be seized. — 147.

If *A.* grant to *B.* that if *B.* be not yearly paid ſo much at *Chriſtmas*, that then he may diſtrain for it in the Manor of *C.* or if he bind his Manor of *C.* and all his Goods in it to the Payment of a yearly Rent to *B.* by ſuch Grants *B.* has a good Rent-Charge and may diſtrain for it, notwithſtanding theſe Words are added, *ad diſtringendum per Ballivum Domini Regis*, for the Diſtreſs is for the Benefit of the Grantee, and if the K.'s Bailiff diſtrain, he does it as Servant to the Grantee, and what the Grantee may do by his Servant, he may do by himſelf, or another; but *B.* can't have a Writ of Annuity by Force of ſuch Grants, becauſe *A.* does not grant to him any Annuity, but only that he may diſtrain, *&c.*

Notwithſtanding ſuch Grant of a Diſtreſs for Rent in the Manor of *C.* ſhall amount to a Grant of a Rent out of *C.* becauſe otherwiſe the Grantee could not have an Aſſiſe; yet if one grant a Rent out of *D.* and a Diſtreſs for it in *C.* the Rent wholly iſſues

iſſues out of *D.* and *C.* is only charged with the Diſtreſs, for theſe Reaſons.

1. *Quoties in verbis nulla eſt ambiguitas, ibi nulla expoſitio contra verba expreſſa fienda eſt.*

2. If the Rent iſſued out of *C.* the bringing of a Writ of Annuity would not diſcharge it, for ſuch Writ would lie upon the expreſs Grant out of *D.* without any Dependance on the Grant of the Diſtreſs in *C.* and then the Grantor would be twice charg'd.

3. It is allow'd that it would only iſſue out of *D.* if *D.* and *C.* were in different Counties, and the Reaſon is the ſame where they lie in one.

4. If *D.* be evicted by an elder Title, or if the Grantee purchaſe Part of *D.* the Rent is extinct, but it ſhall not be extinct by his Purchaſe of Parcel of *C.* as it would be, if it iſſued out of it.

One entire Rent can't be partly a Rent-Charge, and partly a Rent-Seck; therefore, if a Rent be granted out of three Acres, with a Clauſe of Diſtreſs for the whole in one of them only, this is a Rent-Seck for the whole. So if Rent be granted in Fee to two, with a Clauſe of Diſtreſs to one of them only; for it can't be a Rent-Charge as to one, and a Rent-Seck as to the other; yet the Diſtreſs is an Appurtenant to the Rent; and if he to whom it is granted die, it ſhall go to the Survivor, and if both of them grant a Rent over, the Grantee ſhall diſtrain. If a Rent be granted to *A.* in Fee, with a Diſtreſs for Life, this is a Rent-

Charge during his Life, and a Rent-Seck after; but if the Diſtreſs be granted but for Years, it is not a Rent-Charge at all, becauſe the Freehold is always Seck. If a Rent be granted for Life out of a Term for Years, and a Freehold, with a Clauſe of Diſtreſs in the whole, the whole ſhall iſſue out of the Freehold, and the Term is only charg'd with a Diſtreſs; but if it had been granted out of the Term alone, it ſhould have iſſued out of the Term, and the Lands had been charged during the Term, if the Grantee had lived ſo long.

A Grant of 20 *s. de qualibet Acra terræ*, charges each Acre, ſo that if there be 20 Acres it amounts to 20 *l.*

A. bargains and ſells to *B.* and before Inrollment, both of them grant a Rent-Charge to *C.* it is now *A.*'s Grant, and *B.*'s Confirmation, after Inrollment it is *B.*'s Grant, and *A.*'s Confirmation.

148. *a.* If the Lord purchaſe the Fee of Part of the Tenancy, or if a Leſſee ſurrender or forfeit Part of his Land to the Leſſor, the Rent, by which the Ten't holds, ſhall be apportioned according to the Value of the Land remaining in his Hands, and extinguiſh'd for the reſt; and if Leſſor grant over Part of the Rev'n, his Grantee ſhall have Part of the Rent.

If Leſſor diſſeiſe his Leſſee of Part of the Land, the Rent ſhall be ſuſpended in the whole; but if he come to Part of the Land by Act of Law, the Rent ſhall be apportion'd for Part, and ſuſpended for the reſt: It may likewiſe be ſuſpended in Part by the Act

Act of a third Perſon; as if there be two Parceners of a Seigniory, and one diſſeiſe the Ten't, the Rent ſhall be ſuſpended for her Moiety only; but it is ſaid, that if the Ten't make a Gift in T. or a Leaſe to the Lord of Part, the Seigniory ſhall be ſuſpended for the whole. *Sed.* (*a*) *Q.*

(*a*) 2 Lev. 43, 44. 1 Ven. 277.

If the Grantee of a Rent-Charge in Fee purchaſe Parcel of the Land in Fee, the whole Rent is extinct, becauſe it is entire, and againſt common Right, and iſſuing out of every Part of the Land, *and wholly depends upon the Deed, which creates it without a Tenure, againſt the natural Courſe of the Law, and therefore muſt be ſtrictly purſued*; but if the Grantor grant that he may diſtrain for the ſame Rent in the Reſidue of the Land, this amounts to a new Grant. *A.* grants to *B.* a Rent for L. and by the ſame Deed grants that *B.* and his Heirs ſhall diſtrain for the ſame Rent, this amounts to a new Grant of a Rent in Fee.

But the Grantee of a Rent, or Annuity of 20 *s.* yearly, may releaſe 10 *s.* or more, or leſs, and diſtrain for the Reſidue, or he may grant over 10 *s.* Parcel thereof, and thereby the Annuity, or Rent is divided; but Part of the Land cannot be diſcharg'd without diſcharging the Reſidue.

When one extinguiſhes a Rent-Charge, (which he has by the expreſs Words of the Grant,) by purchaſing Part of the Land, which is his own Act, he cannot afterwards have a Writ of Annuity, which is given by Implication only: But where a Rent determines

mines by the Act of God, as where Ten't *pur autre Vie* grants a Rent for 21 Years, and *ceſtuyque Vie* dies during the Years, or where it is defeated by the Eviction of the Land charg'd by an elder Title, the Grantee ſhall have a Writ of Annuity.

Co. L. 149. b. 150. a. A Rent-Charge may be ſuſpended in Part, or extinct in Part by Act of Law; as if Part of the Land charg'd deſcend to the Grantee, or be recovered by him as Heir to his Anceſtor, who had aliened the ſame within Age, or while he was *Non Compos*; or if the Rent deſcend to the Ten't of Part of the Land. So if a Man grant a Rent-Charge in Fee out of his Land to one of his Daughters, and die ſeis'd of the Land, and a Moiety thereof deſcend to the Grantee, the ſaid Moiety is diſcharg'd of the Rent, both in her Hands, and in the Hands of her Feoffee, and the other Moiety in the Hands of her Siſter, is charg'd with a Moiety of the Rent. The Husband makes a Feoffment, and the Feoffee grants a Rent out of the Land to the Wife, the Husband dies, the Wife by Cuſtom recovers a Moiety for her Dower, ſhe ſhall have but a Moiety of the Rent, for tho' by Relation her Dower be above the Rent, yet ſuch Fictions of Law are always equitable. But in all theſe Caſes, where the Rent-Charge is apportioned, the Writ of Annuity fails, for that muſt be grounded on the Deed on which it was granted, and the Perſonalty is indiviſible, according to the Rule,

Annua

Annua nec debitum Judex non ſeparat ipſum.

And for the ſame Reaſon, if the Fee of Part of Land extended on an Execution deſcend to the Conuſee, all the Execution is avoided, for the Duty being Perſonal can't be divided.

If Grantee of a Rent-Charge grant the ſame to the Ter-tenant, and a Stranger, it ſhall be extinct for a Moiety.

If a Man ſeiſed of two Acres, of the one in T. and of the other in Fee, grant a Rent out of both, and die, and the Acre in T. deſcends to the Iſſue, the whole Rent-Charge ſhall iſſue out of the other Acre. So if one grant a Rent out of two Acres, and afterwards one of them be evicted, either by a Stranger, or the Grantee himſelf, by a Title Paramount, as for a Condition broken, *&c.* the whole ſhall iſſue out of the other Acre, for the Acre which is evicted is abſolutely diſcharg'd from the Rent, and the Grantor ſhall not, to avoid his own Grant in the whole, or in Part, take Advantage of the Weakneſs of his own Eſtate. 148. *b.*

But if a Man ſeiſed of one Acre in T. and of another in Fee, make a Leaſe of both reſerving Rent, and die, and the Leaſe of the Acre in *T.* be avoided by the Iſſue, the Rent ſhall be apportioned: So where a Man makes a Leaſe of two Acres, reſerving Rent, on Condition that the Leſſee ſhall have Fee in one of them on doing ſuch an Act, if the Leſſee perform the Condition, the Rent ſhall be apportion'd, becauſe it is incident to the Rev'n,

yet

yet by Relation, the Leſſee has the Fee-ſimple *ab initio.*

If a Leſſee L. grant a Rent to his Leſſor out of an Acre leaſed to him by the Leſſor, and out of another Acre which he has in Fee; and after the Leſſor enter for a Forfeiture into the Acre leas'd by him, or recover it in an Action of Waſte, the Rent ſhall not be extinct, for tho' the Leſſor claim Part of the Land charg'd under the Leſſee, yet ſince it is given him by Law for the wrongful Act of the Leſſee, the Leſſee ſhall not take Advantage of it to extinguiſh the whole Rent; nor ſhall it wholly iſſue out of the Land in Fee, becauſe the Leſſor claims the other Acre under the State of the Leſſee, and ſubject to his Charges during the Term, and therefore it ſhall be apportion'd.

149. Entire Services ſhall be multiplied by a Stranger's Purchaſe of Part of the Land holden by them, but they ſhall be extinguiſhed by the Lord's Purchaſe of Part of the Land, unleſs they be *pro bono Publico*, as for the Defence of the Realm, or Advancement of Juſtice, or conſiſt in Works of Charity, or Piety; for ſuch Services ſhall remain after the Lord has purchas'd Part of the Land. Three Jointenants hold by a Horſe, the Lord recovers *in Ceſſavit* againſt two of them, the whole Service is extinct.

Notwithſtanding a Common *ſans Nombre* can't be apportion'd, becauſe it is uncertain, yet if Part of the Land charged therewith deſcend to the Commoner, the Common

mon ſtill remains, but the Ter-ten't ſhall not be prejudiced thereby.

If Lord by Kt. Service had purchas'd Part of the Land ſo holden, the Homage and Fealty remain'd, albeit they were entire, becauſe they coſt the Ten't nothing. But the Eſcuage ſhould have been apportion'd according to the Value of the Land. If the Ten't had alſo holden by an Heriot, the Heriot ſhould have been extinct, becauſe it is entire and valuable; by which it appears, that entire Services, which are valuable, ſhall be extinguiſh'd by the Lord's Purchaſe of Part of the Land, whether they be annual or not. But if a Heriot be due to the Lord by Cuſtom, on the Death of every Ten't, it ſhall not be extinct by the Lord's Purchaſe of Part, *for the Ten't of Part is ſtill a Ten't.*

A Rent-Service may become a Rent-Seck by the Grant of him that has it ſevering the Fealty from it. Therefore, if there be Lord and Ten't by Fealty and Rent, and the Lord grant over the Rent in Fee, or T. ſaving the Fealty, the Rent paſſes as a Rent-Seck, for the Land is ſtill holden of the Lord becauſe of the Fealty, which always makes a Tenure, and it cannot be immediately holden of two Lords at the ſame Time; and notwithſtanding, in ſuch Caſe, the Lord grant further that the Grantee ſhall diſtrain, yet the Rent ſhall paſs as a Rent-Seck, for the Lord had no Power to make ſuch Grant. But if ſuch a Lord releaſe to the Ten't all his Right to the Land, ſaving the Rent, it continues a 150.

Rent-

Rent-Service. If one make a Gift in T. reſerving Rent, and then grant over the Services, the Fealty, as inſeparably incident to the Rev'n, remains in him, but the Rent ſhall paſs, and yet it ſhall be but a Rent-Seck in the Hands of the Grantee. If two Co-parceners of the Seigniory make Partition, and the Fealty be allotted to the one, and the Rent to the other, it becomes a Rent-Seck. If there be Lord and Ten't by Fealty, and Suit of Court, and the Lord grant over the Fealty, the Suit of Court is gone; for it can't be due to the Grantor, becauſe he ceaſes to be Lord, nor to the Grantee, becauſe he can keep no Court. If a Rent-Service, which is Part of a Manor, become a Rent-Seck, by the Lord's Releaſe of the Fealty to the Ten't, or by the Lord Paramount's Purchaſe of any of the Tenancies, it continues Part of the Manor; but the Nature of it is ſo far chang'd, that, in an Aſſiſe for it, all the Ter-ten'ts muſt be nam'd, as they muſt be in Aſſiſes for other Rents-Seck, or Rents-Charge.

The Lord of whom Land was holden by Homage, Fealty, and Rent, could not by his Grant ſever the Homage from the Fealty, while the Homage continued, but he might have releas'd the Homage ſaving the Fealty. If he had granted over the Rent, or ſuffer'd a Recovey thereof by Conſent, the Homage ſhould not have paſſed with it;
151. but a Recovery of the Rent by an elder Title had incluſively recover'd the Homage, becauſe no *Præcipe* did lie for the Homage, but

but only for the Rent. Yet if there be Lord and Ten't by Fealty and Rent, and the Ten't grant over the Rent, the Fealty ſhall paſs as incident to it, unleſs it be expreſly excepted.

Before 12 Ca. 2. 24. Homage and Eſcuage did neceſſarily make a Tenure, as Fealty ſtill does at this Day, and the Lord had an inſeparable Right to diſtrain for them.

If one make a Gift in T. or a Leaſe L. or Y. reſerving Rent, and grant the Rent, ſaving the Rev'n, it becomes Seck, yet *at Law* it could not paſs without Attornment; but if the Rev'n be granted for Life, the Rent paſſes as a Rent-Service, for the Services paſs by the Grant of the Rev'n, without ſaying *cum Pertinentiis*, but the Rev'n 152.
paſſes not by the Grant of the Services, for *Acceſſorium ſequitur, non ducit ſuum Principale.*

If there be Lord, Meſne and Ten't, and the Lord purchaſe the Tenancy, the Meſnalty is extinct, for the Lord ſtill holds of the Lord next above him, and if he ſhould alſo hold of him that was Meſne, then he ſhould hold the ſame Land immediately of ſeveral Lords, which is againſt the Rules of Law. *Nor is it againſt Reaſon that this ſhould extinguiſh the Meſnalty, for it is no more to the Meſne's Prejudice, than the firſt Creation of the Meſnalty was to the Lord's.* And if the Ten't make a Gift in T. Rem'r to K. he extinguiſhes all the Meſnalties, *for the Fee-ſimple in K. can be holden of no one, and the Fee-ſimple of the Meſnalties being extinct, there can't be*

be a particular Eſtate thereof, for the particular Eſtate and the Rem'r, being as one Eſtate in Law, the Rem'r can't be diſcharged of the Meſnalty, and the particular 5 Rep. 134. b. *Eſtate remain charg'd.* And it is ſaid that the Lord may likewiſe extinguiſh a Meſnalty, by confirming the Eſtate of the (a) Contra Co. L. 305. b. Ten't to hold of him in (a) Frankalmoine, or by releaſing to him all his Right. When the Meſnalty is extinct in the Manner aforeſaid, he that was Meſne ſhall diſtrain of common Right, for ſo much as the Rent paid to him by the Ten't exceeded that paid by him to the Lord, which remaining Rent is called a Rent-Seck by Surpluſage. And the Conuſee of a Statute, that has Rent reſerv'd on a Leaſe extended and deliver'd to him, ſhall diſtrain for it, becauſe he comes to it by Courſe of Law.

153. If he that has a Rent-Seck be once ſeis'd of any Part thereof, and the Rent be afterwards behind, he ought to go by himſelf or ſome other to the Land, either on the Day of Payment, or after, and demand the Rent at the Houſe, or on any Part of the Land, and if the Ten't deny it, this is a Diſs'in of the Rent, or if he be not ready to pay, or be abſent, this is a Denial in Law, and a Diſs'in, for which an Aſſiſe lies; but the Grantee muſt make a Demand of the Rent, whether the Ten't be preſent or abſent, for he can't be diſſeis'd thereof unleſs he demand it. *And if the Ten't be ready on the Land to pay it on the Day, and there be none on the Part of the Grantee*

Grantee to receive it, the Grantee (a) *can't, before the next Day of Payment, make the Ten't a Diſs'or but by a perſonal Demand of the Rent from the Ten't himſelf upon the Land; for no Man ſhall be liable to pay Damages, &c. without a wilful Fault.* (b) *If Rent be granted out of one Houſe payable at another, it may be demanded at either.*

(a) 7 Rep. 29. Ho. 207.

(b) Cro. Ca. 508.

If one make a Leaſe L. of Land in two Counties, reſerving Rent, ſuch Rent is entire, and the Leſſor may in either County diſtrain and avow for the whole: Or he may have an Aſſiſe *in confinio Comitatus* by 7 *R.* 2. 10. whether the Counties are adjoining or not, but the Juſtices ſhall have but one Patent, *tho'* (c) *the Writs be ſeveral*, and one may have ſuch an Aſſiſe for Rent iſſuing out of more Counties than two; and by Common Law, if divers Manors, in divers Counties, be holden by one Tenure, the Lord may have ſeveral Writs of Cuſtoms and Services in each County, and Count according to his Caſe; but if the Ten't do *Ceſſe*, the Lord can't have ſeveral Writs of *Ceſſavit*, for the ſaid Writ is given by (d) Statute, and the Form therein preſcrib'd muſt be ſtrictly purſued.

154.

(c) F. N. B. 180. a.

(d) W. 2. 21.

If the Grantee of Rent recover in Aſſiſe of Novel Diſs'in, and be after diſſeis'd again by the ſame Diſs'or, he ſhall have a Writ of Re-diſſeiſin by 20 *H.* 3. 3. which Statute only mentions Re-diſſeiſin after Recoveries by Aſſiſe, or Confeſſion, before Juſtices *in Eyre*, and yet it is ſaid to extend to recoveries on Demurrer, *&c.* as well

well before other Juſtices as thoſe, *ſed Q. for if this be ſo, to what Purpoſe was* W. 2. 26. *made, which provides for theſe Caſes, and ſeems to ſuppoſe that they were not within the Purview of* 20 H. 3.

Vide 2 Inſt. 417.

The firſt Recovery muſt be in Aſſiſe of Novel Diſs'in, but if it were by a Writ of Right Cloſe, or Aſſiſe of freſh Force, no Re-diſs'in lies.

Every Writ of Re-diſs'in muſt be between the ſame Diſs'ee and Diſs'or that were Parties to the firſt Recovery, where *Idem* is taken for *non alius*; therefore if a Diſs'ee recover in an Aſſiſe againſt two, and after be diſſeis'd by one of them, he may have a Re-diſs'in againſt him, *for here is no new Defendant not guilty of the former Diſs'in.* So where Parceners or Jointenants are diſſeis'd, and recover, and make Partition, and then are re diſſeis'd, they ſhall have ſeveral Re-diſs'ins, for here is no new Plaintiff, not wrong'd by the firſt Diſs'in. If a *Feme Sole* recover in Aſſiſe, and take Husband, and they are re-diſſeis'd, they ſhall have a Re-diſs'in, for the Husband only joins with the Wife for Conformity, ſo that in Effect the Diſs'ee is the ſame. If one guilty of a Re-diſs'in make a Feoffment, the Diſs'ee ſhall have a Re-diſs'in againſt him and the Feoffee; for the Right of bringing this Action veſted in the Diſs'ee ſhall not be deſeated by the Feoffment. But if a Diſs'ee recover againſt one, and afterwards be re-diſſeis'd by him and another, or if he recover againſt a *Feme Sole*, and then be re-diſſeis'd by her and another whom ſhe afterwards

wards marries, he can't have a Re-diſs'in, for here another muſt be join'd in it, who was not guilty of the firſt Diſs'in. In an Aſſiſe againſt *A.* and *B.* *A.* is found Diſs'or, and *B.* Ten't, the Plaintiff recovers, and afterwards is diſſeis'd by *B.* he ſhall not have a Rediſs'in againſt him, becauſe he diſſeis'd him but once.

Nota, Double Impriſonment & Double Damages

The Words of the Statute are, *de eodem Tenemento, &c.* yet if one be re-diſſeis'd of Parcel of that which was formerly recover'd; or if one recover a Rent Service, which after becomes a Rent-Seck by Surpluſage, and then be re-diſſeis'd thereof; or if Ten't in T. recover in Aſſiſe, and then become Ten't in T. *Apres, &c.* and be reſeis'd; or if one recover Land to which Common is appurtenant, and then be re-diſſeis'd of the Common; in all theſe Caſes he may have a Writ of Re diſs'n.

Aſſiſe is ſometimes taken for a Jury, 155.
ſometimes for the whole Writ of Aſſiſe, ſometimes for an Ordinance to put Things into a certain Rule.

Albeit the Words of the Writ of Aſſiſe be *quod vicecomes faceret duodecim videre Tenementum, &c.* yet by ancient Courſe he muſt return 24.

Every Juror ought to be *Liber & Legalis* of the Neighbourhood, ſufficient in Underſtanding and Eſtate, and indifferent as he ſtands unſworn.

Either Party may have his Challenge either to the Array of the whole Jury, for ſome Default in the Officer that return'd

turn'd it, or to the Polls, *i. e.* to the particular Jurors.

A Challenge is either Principal, or to the Favour; a principal Challenge is grounded on ſuch a manifeſt Preſumption of Partiality, that if it be found true, it unqueſtionably ſets aſide the Array, or the Juror, but a Challenge to the Favour leaves it to the Diſcretion of the Triers. There are many principal Cauſes of Challenge to the Array; as if the Officer return any Juror at the Parties Denomination, or that he may be more favourable to one Party than the other, or if the Array be return'd by a Bailiff of a Franchiſe, and the Sheriff return it as of himſelf, in which Caſe the Party ſhould loſe his Challenges, *for a Default in the Bailiff, becauſe the Return on Record is in the Sheriff's Name; but if* the Sheriff return one within a Liberty, this is good, and the Lord of the Franchiſe is put to his Action againſt him. It is alſo a good Cauſe of a principal Challenge if no Knight be returned in an Attaint, ☞ when a Lord of Parliament is Party, either ſole, or join'd with others; but it is ſufficient if a Knight be return'd, whether he appear or not. The K. may take a principal Challenge, or to the Favour, and it ſhall be tried according to the uſual Courſe, and when he is a Party; or in Caſe of Life, the Subject may take a principal Challenge, but not to the Favour. If the Array be challeng'd on both Sides, or return'd by one that has no Liberty, or if a Bailiff return a Juror that is not within his Liberty, the Array ſhall be quaſh'd.

Co. L. 157. b.

If

If the Sheriff be liable to the Diſtreſs of either of the Parties mediately or immediately, or if he be his Servant, or Officer in Fee, or of Robes, or his *(a)* Counſellor, or Attorney, or have Part of the Land depending on the ſame Title, or if he has been Godfather to a Child of either of the Parties, or either of them to his, or if either of 'em have an Action of Debt againſt him, or if an Action of Battery or ſuch-like, which implies Diſpleaſure, are depending between them; Theſe are principal Challenges to the Array, and ſuch Exceptions againſt a Juror are principal Challenges of the Polls. But if either of the Parties be ſubject to the Diſtreſs of the Sheriff, *&c.* or if the Sheriff, *&c.* have an Action of Debt againſt either of the Parties, theſe are Cauſes of Challenge to the Favour only, *for the Sheriff*, &c. *thereby is not under the Party's Influence, but the Party under his.*

(a) But by Finch of Law, 402. *Theſe are Challenges to the Favour only.*

Conſanguinity, how remote ſoever, between the Sheriff, or Juror, and either of the Parties, or Affinity by Marriage of either Party himſelf with the Couſin of the Sheriff, or the Juror, or *è converſo*, are Cauſes of principal Challenge to the Array or to the Polls: But if the Marriage be between the Son of the one, and Daughter of the other, it is a Cauſe of Challenge to the Favour only. He that challenges *the Array*, or a Juror for Couſenage, muſt ſhew how the Party is Couſin, but if it be found that he is Couſin, it is ſufficient, whether it be found in the Manner alledged or not. *Note*, That a Baſtard can have no Kindred. C. L. 157. a.

Two

Two Strangers made up a Panel fairly, and the Sheriff return'd it, the Array was challeng'd for this Cauſe, and the Challenge was over-rul'd.

Fitz. Chall. 102.

Co. L. 157. b. 158. a. Cro. Ja. 547.

If the Defendant may have a principal Challenge to the Array, the Plaintiff may alledge it, and pray Proceſs to the Coroners; and if he alledge a good Cauſe againſt any of them alſo, he may pray Proceſs to the reſt; if againſt all of them, the Court ſhall appoint certain Eliſors, againſt whoſe Return no Challenge can be had; but the Plaintiff can't have ſuch Proceſs to the Coroners, *&c.* unleſs the Defendant will confeſs ſuch Cauſe alledged by the Plaintiff to be true; and if he will not confeſs it, the Proceſs ſhall go to the Sheriff, and the Defendant ſhall not challenge the Array for that Cauſe. But the Defendant can't alledge ſuch Matter, and pray Proceſs to the Coroners. *For it ſhall not be intended that the Plaintiff, to delay himſelf, will challenge the Array without ſome actual Partiality*, and when the Array is quaſh'd, Proceſs ſhall be awarded to the Coroners, *&c. ut ſupra.*

Co. L. 158. a.

Note; When Proceſs is once awarded to the Coroners, *&c.* for the Sheriff's actual Partiality, the Entry is, *Vice-comes ſe non intromittat*, and in ſuch Caſe, Proceſs ſhall not afterwards be awarded to any new Sheriff; but where it was awarded to the Coroners, for that the Sheriff is Ten't, *&c.* it may be awarded to a new Sheriff.

Challenges to the Polls are four-fold. 1. Peremptory. 2. Principal. 3. To the Favour. 4. For not being of the Hundred.

1. A Peremptory Challenge is when a Party challenges a Juror without ſhewing any Cauſe; at Law, one indicted or appeal'd of Treaſon or Felony, or alledging Matter to avoid an Outlawry thereon, might, *in favorem Vitæ*, have callenged peremptorily 35. But now in Caſe of Petit Treaſon, Murder or Felony, he can challenge but 20. After one has taken his peremptory Challenges, he may challenge, for Cauſe, as many more as he will; and if he have challeng'd one for Cauſe, and that be found againſt him, he may after challenge him peremptorily. Co. L. 157. 1 Lev. 61. contra. Co. L. 158.

In Appeal againſt divers, if the *Venire* be joint, a Juror challenged peremptorily againſt one, ſhall be drawn againſt all; but if the *Venire's* be ſeveral, he may be drawn againſt one, and remain as to the others.

K. at Law might challenge peremptorily as many as he would, but at this Day by 33 *Ed.* 1. he muſt ſhew Cauſe; *but he is not bound to ſhew it before the Panel is gone through, as a Subject muſt.* 1 Vent. 309, 310.

A Peer can't challenge any of his Peers.

2. Principal Challenges of the Poll are four-fold.

The Firſt is in reſpect of the Dignity of a Juror, as if a Peer of the Realm be return'd on a Jury, he may either be challenged, or challenge himſelf.

The Second is in reſpect of ſome Defect of the Juror, either in his Birth, as if he be an Alien; or in his Condition, as if he be a Villein; or in his Age, as if he be a Minor; or in his Eſtate, as if he have no Freehold

hold in the ſame County, out of antient Demeſne, at the Time of his Appearance, either in his own Right or another's. But by 23 *H.* 8. 13. *Inhabitants in corporate Towns, worth* 40 l. *in Goods, may try Felonies in Seſſions, and Gaol-Deliveries for ſuch Towns.* (a) *And this is not repeal'd by ſubſequent Statutes concerning Jurors.* 4 & 5 Gul. & Ma. 24. *requires that all Trials in the Courts at* Weſtminſter, *or before Juſtices of* Niſi Prius, *Oyer and Terminer, or Gaol-Delivery, or General Seſſions of the Peace, muſt be by Jurors, whereof each is worth* 10 l. per Annum *of Freehold or Copyhold in the ſame County, if the Trial be in* England, *and by Jurors worth* 6 l. per Annum *if in* Wales; *and Tales Men muſt have* 5 l. per Annum *in* England, 3 l. per Annum *in* Wales.

(a) 1 Ven. 366.

157. The Third is in Reſpect of the Affection or Partiality of the Juror; as if he be of Kin to either Party, and if an Action be brought by a Corporation, and the Juror be of Kin to any Member thereof, it is a principal Challenge, and if a Juror be challenged for being of Kin to one Party, it is no Counterplea that he is of Kin alſo to the other, for the *Venire* commands the Sheriff to return thoſe that are of Kin to neither.

Vide ſupra 235.

It is alſo a principal Cauſe of Challenge, that the Juror is a Witneſs named in the Deed, or hath formerly given a Verdict on the ſame Cauſe, whether between the ſame Parties, or others: But this is only a Challenge to the Favour, if the Record be of

another Court, and not ſhewn forth; but if it be of the ſame Court, it is ſufficient to ſhew the Day and the Term.

It is alſo a principal Challenge that a Juror hath indicted the Party for the ſame Cauſe, or hath eaten or drunk at his Charge, or taken Money to give his Verdict; or that he is a Pariſhioner of the Pariſh whereof the other Party is Parſon, if the Right of the Church comes in Queſtion; or that he hath been an Arbitrator choſen by the Party in the ſame Cauſe, and hath treated thereof: But an Arbitrator choſen by both Parties, whether he have treated of the Matter or not, or choſen by one Party, if he has never treated thereof, or a Commiſſioner choſen by one Party for Examination of Witneſſes, and appointed under the Great Seal, can't be challenged principally; but for ſuch Cauſe one may be challenged for Favour.

The Party himſelf may labour a Juror to appear, and diſcharge his Conſcience, *but a Stranger doing the ſame is an Embraceor.* Hob. 294.

158. The Fourth is in reſpect of ſome Offence of the Juror; as if he be attainted or convicted of Treaſon or Felony, or any Offence to Life or Member; or in Attaint for a falſe Verdict; or of Perjury as a Witneſs; or Conſpiracy at K.'s Suit; or in any Suit for K. or Subject, be adjudged to a corporeal Puniſhment, whereby he becomes infamous; ſo if he be outlawed in a criminal or civil Proſecution; and ſome ſay if he be excommunicate.

3. Challenges to the Favour are infinite; as if the Juror be a Fellow Servant to the Party himſelf, or Couſin, *&c.* to him in Rev'n, which is but to the Favour, becauſe he in Rev'n is not Party to the Record; but it would be a principal Challenge, if he were Party by Voucher, Aid, or Receipt.

4. Challenges for the Hundred avoided the Array, *by Common Law*, if 4, *and by* (*a*) *Statute*, *if* 6, of the Hundred, where the Cauſe of Action aroſe, did not remain on the Jury. *But now by* 4 *&* 5 Annæ 16. *no Hundredors are required except in Proſecutions Criminal, and on penal Statutes, becauſe in other Caſes the Venire ſhall be* de Corpore Comitatûs.

(*a*) 35 H. 8. 6. 2 Ed. 6. 32.

(*a*) Dyer 231. p. 3.

(*b*) Co. L. 158. a.

He that (*a*) takes ſuch a Challenge, muſt ſhew in what Hundred the Viſne lies, and he (*b*) muſt take it before ſo many are ſworn as will ſerve for the Hundred, and he that is challenged for the Hundred ſhall not be drawn abſolutely, but ſhall remain *præter Hundredum.*

No Hundredors are required when the Jury comes *de Corpore Comitatûs*, or *de proximo Hundredo*, for that the Lord of the Hundred is Party.

If a Perſon dwell in the Hundred, whether he have any Freehold there or not, or if he had a Freehold there when he was return'd, and ſell it before he appear, he is a good Hundredor; but if he ſell all his Freehold he may be challeng'd abſolutely.

In an Attaint the Jurors are troubled, and yet the ſame Number of Hundredors ſuffices

ſuffices; if divers Hundreds are in a Leet, or if the Cauſe of Action aroſe in diverſe Hundreds, the Hundredors may come from any of them.

One ſhall not have ſuch Challenge to the Polls as he might have had to the Array. And after one has taken a Challenge to the Polls, he ſhall not after challenge the Array.

When the Inqueſt is awarded by Default, the Defendant loſes his Challenges, but the Plaintiff does not.

Tho' a Man can't plead a double Plea, yet he may have diverſe Challenges, but he muſt take them all at once. After the Challenge of one Party is tried, and the Juror found indifferent, the other Party may challenge him.

If the Party challenge the Array, and it be found againſt him, and the ſame Party challenge the Polls, he muſt ſhew Cauſe preſently, *i. e. before the Clerk has gone through the Panel*, ſo muſt the Defendant in Appeals of Felony, and where K. is Party, and ſo muſt he that challenges a Juror after he is ſworn, and ſuch Cauſe muſt ariſe after he is ſworn.

The (*a*) Array of the Tales ſhall not be challenged by the ſame Party till that of the Principal be tried; but if the Plaintiff challenge the Array of the Principal, the Defendant may that of the Tales; and in that Caſe one of each Panel ſhall try them both.

(*a*) Bro. Chall. 61. contra.

If the (*b*) Array of the principal Panel be quaſh'd, the ſame Triers ſhall not try

(*b*) 14 H. 7. 2. Bro. Chall. 61. contra.

the Array of the Tales; but if they affirm the principal Panel, they ſhall try the Array of the Tales.

The Challenge of the Array ſhall be tried by two of thoſe impanelled, to be appointed by the Court, not more than two without Conſent; but when the Court has nam'd two, they may, for ſome ſpecial Cauſe alledged by either Party, name others. And if the Polls be challenged, *before any of the Jurors are ſworn*, the Court ſhall appoint two Triers, *of thoſe that are impanelled*, and if they try one, and he be ſworn, they three ſhall try another; and if he be found indifferent and ſworn, the two Triers ſhall ceaſe, and the two Jurors ſworn ſhall try the reſt. *And a Challenge to the Polls taken after any Jurors are ſworn, ſhall be tried by them that are ſworn.* If the Plaintiff challenge ten, and the Defendant one, and the 12th be ſworn, he ſhall be added to one of them challenged by the Plaintiff, and the other challenged by the Defendant.

Finch of Law 412.

Such Challenges as do not ſound in Reproach of the Juror, ſhall be examined on his Oath to inform the Triers.

When the Plaintiff recovers *per viſum Juratorum*, there ought to be 6 of the Jurors who have had the View, or have known the Land.

Challenges have been allowed *in a Proprietate Probanda*, and in a Writ to enquire of Waſte.

259. A Layman having an Intereſt in Tithes, Penſions, or other Eccleſiaſtical Duties, and being

being deforc'd thereof, by any claiming the ſame, may have an Aſſiſe, or other original Writs by 32 *H.* 8. 7. for they are made Lay-Inheritances in the Hands of Laymen, and ſhall be Aſſets; Men ſhall be Tent's by Curteſy, and Women endowed of them. The Aſſiſe for 'em muſt be *de Libero Tenemento*, and a ſpecial Plaint made. But a *Præcipe* ſhall be *quod reddat omnes & omnimodas decimas Majores minutas & mixtas infra* D. *quoquo modo creſcen' contingen' ac annuatim renovan'*. But before that Statute, Laymen had no Remedy for the Recovery thereof.

And by the ſaid Statute, and 2 & 3 *Ed.* 6.13. Lay-men, as well as ſpiritual, ſhall ſue for the not ſetting out, with holding or refuſing to pay Tithes and Offerings, and other Spiritual Duties, in the Spiritual Court, *and no other*; *yet it is a common Practice to ſue for them by* Engliſh Bill *in Chancery or Exchequer*; *for it is ſaid, that Courts of Equity had always a Juriſdiction in ſuch Caſes, and it ſeems that the ſaid Statutes only deſign'd to reſtrain the Common Law Courts from aſſuming a new Juriſdiction, and not to take from other Courts a Juriſdiction legally veſted in them before.* And the 2 & 3 *E.* 6. 13. enacts, That whoever ſhall ſubſtract predial Tithes, ſhall pay the treble Value, to be recovered at Law, or the double Value to be recovered in the Spiritual Court; and tho' it be not ſaid to whom it ſhall be paid, yet the Owner of the Tithes, whether he be Lay or Spiritual, ſhall have it; for when a Statute gives a Forfeiture againſt him that diſpoſſeſſes another of his Duty or Intereſt, Vid. Watſ. 485.

the Party wrong'd and not K. ſhall have it. Both Lay and Spiritual Perſons may ſue in either Court.

If there be Lord and Ten't, and the Lord grant the Rent, ſaving the Services, and the Ten't attorn; tho' this gives a Seiſin in Law, as the Delivery of a Deed does when Rent is granted out of Land, yet if the Rent be denied the next Day of Payment, the Grantee has no Remedy, (in Law or Equity.) *Q. If this be not to be underſtood of a Grant made without valuable Conſideration.* But if the Ten't, when he attorns, give a Piece of Money or a Ring, or an Ox, or any valuable Thing, in the Name of Seiſin of the Rent, this gives ſuch a Seiſin as will maintain an Aſſiſe the next Day of Payment, if the Rent be denied, tho' it be no Part of the Rent, nor ſhall be abated out of it. And a Man may have any other real Action for a Rent-Seck, after actual Seiſin thereof once had, as well as for other Rents.

The Reaſon is, 'tis Same Rule to come at Right, and always taken Formerly, 160.

There be ſeven Cauſes of Diſs'in of Rent-Service.

The firſt is Reſcous of a Diſtreſs taken for the Rent behind.

The ſecond is Reſiſting the Lord in taking a Diſtreſs.

Reſcous is *properly* a Setting at Liberty againſt Law, a Diſtreſs taken, or Perſon arreſted by Proceſs or Courſe of Law. But if the Lord diſtrain for Rent when none is due, the Ten't may lawfully make Reſcous, or Reſiſtance; and ſo may a Stranger, if his Beaſts be diſtrain'd for Rent when none is behind

behind. And if the Ten't tender the Rent to the Lord, when he comes to diſtrain, and yet the Lord will diſtrain, or if the Lord diſtrain any Thing not diſtrainable, as Beaſts of the Plough, when other ſufficient Diſtreſs may be taken, the Ten't may make Reſcous; ſo may he if the Lord diſtrain in the (a) Highway, or out of his Fee. But if the Lord come to diſtrain, and have View of the Cattle, and the Ten't or any other to prevent the Lord drive them out of his Fee, and the Lord purſue, and diſtrain them, the Ten't can't reſcue them; for in ſuch Caſe in Judgment of Law they are taken within his Fee, and ſo ſhall the Writ of Reſcous ſuppoſe. But if they go of themſelves out of the Fee or be driven off for other Cauſe, whether before or after the Lord's View; or if the Ten't drive them off purpoſely before the View, the Lord can't diſtrain out of his Fee: *But now by* 8 Annæ, *If any Leſſee ſhall fraudulently convey his Goods from the Premiſſes to prevent the Leſſor's Diſtreſs, the Leſſor may within* 5 Days *ſeiſe them*, &c. *as a Diſtreſs where-ever found. But if they be ſold* bona Fide, *before the Leſſor's Seiſure, he can't diſtrain them.*

(a) Marl. 15. 161.

None can diſtrain for Damage-Feaſant unleſs the Beaſt be Damage-Feaſant at the Time; therefore if one come to diſtrain for Damage-Feaſant, and ſee the Beaſts on his Land, and the Owner of them drive them off purpoſely to avoid the Diſtreſs, and the Ten't diſtrain them, he may reſcue them. If one not guilty be arreſted by the Sheriff of his own Authority for Felony, he may

reſcue himſelf; but if he had been taken by Force of a *Capias* for Felony, he could not.

The Third is ſuing a Replevin *without Cauſe* by Writ or Plaint, for tho' it be regularly true, that a Man ſhall not be puniſh'd for ſuing Writs in K.'s Courts, the Rule fails in this Caſe, becauſe it diſturbs the Lord of the Mean by which he is to come to his Rent; ſo the Turning of the Stream is a Diſs'in of the Mill, *nam qui adimit Medium, dirimit Finem*; ſo to diſturb a Man to enter and manure his Land is a Diſs'in of the Land, *qui enim obſtruit Aditum, deſtruit Commodum.*

The Fourth is Incloſure, for the Lord can't break open the Gates, or break down the Incloſures to diſtrain.

The Fifth is to counterplead the Plaintiff's Title whereby he is delay'd, but to plead *Null Tort, &c.* is no Diſs'in.

W. 2. 25. The Sixth is to vouch a Record, (*whereby the taking of the Aſſiſe is deferr'd,*) and fail of it *at the Day given to bring it in.*

The Seventh is when the Ten't meets the Lord or Grantee going to diſtrain for, or demand the Rent, and menaces them in ſuch a Manner, that they dare not go to the Land to diſtrain for, or demand the Rent behind for fear of bodily Hurt.

And there are 8 Cauſes of Diſs'in of a Rent-Charge, *viz.* all the Cauſes aforeſaid, and alſo Denial; but Denial is no Diſs'in of a Rent-Service, *for he that has ſuch Rent ſhall not be ſaid to be diſſeis'd, whilſt the proper Remedy given him by Law lies open to him; but the Grantee's Power to diſtrain may by uncertain,*

certain, becauſe it depends wholly on the Validity of the Clauſe in the Deed; therefore if he wave it, he ſhall at leaſt be in as good a Caſe as if there were no ſuch Clauſe. There are two Jointenants, and the Grantee of a Rent-Charge diſtrains, one makes Reſcous, both are Diſs'ors, for the Diſtreis was a Demand, and the Non-payment a Denial and Diſs'in, but the Reſcuer alone is a Diſs'or with Force.

And there are 3 Cauſes of Diſs'in of a Rent-Seck, *viz.* Denial, Incloſure and foreſtalling the Way, *&c.*

By 32 *H.* 8. 37. Executors or Adminiſtrators of a Man ſeis'd of a Rent-Service, Rent-Charge or Seck, in Fee, or Tail, or for L. may diſtrain, or have Debt for the Arrears incurr'd in the Life of the Teſtator, or Inteſtate. But at Law there was no Remedy for Executors, *&c.* of a Man ſeis'd of ſuch Rent to recover ſuch Arrears, as long as the Freehold of the Rent continued; but after an Eſtate L. in Rent determin'd, the Executors at Law might have had an Action of Debt. 162.

By the ſaid Statute the Action of Debt lies only againſt him that took the Profits when the Rent was behind, and his Executors or Adminiſtrators; but a Diſtreſs may be taken on the Land in the Hands of any †claiming by or from him, *i. e.* under him, but not above him as Lord by Eſcheat.

† In case it is a Rent charge claiming under ye Grantor.

But where the Teſtator or Inteſtate had no Remedy, the Executors or Adminiſtrators have none; as where the Lord grants away his Seigniory before his Death.

The Lord's Executors can't diſtrain him in Rem'r for the Arrears in the Life of Ten't L. for he claims not under him; but if a Rent-Charge be granted to *A.* for the Life of *B.* and then the Land be lett to *C.* for Life, Rem'r to *D.* the Rent is behind, *B.* dies, and after *C.* dies, *A.* may diſtrain *D.* for all the Arrears, in reſpect of the different Penning of the Act in thoſe two Caſes, *for the Statute expreſly ſays, that Ten't* pur autre Vie *of Rent, his Executors,* &c. *ſhall diſtrain for the Arrears, in ſuch Manner as he might have done if* cestuyque Vie *had been alive.*

The ſaid Act extends to all Rent, whether it be reſerv'd in Money or Corn, *&c.* and whether it be payable every Year, or every 2 or 3 Years, *&c.* but it extends not to corporal Services, nor to a *Nomine Pœnæ,* (but for this he and his Executors may have Debt;) nor to Relief, (but for this the Lord may diſtrain, and the Executors may have Debt.)

The Husband of one ſeis'd of Rent in Fee, *&c.* ſhall after the Wife's Death have the ſaid double Remedy for the Arrears incurr'd before and after Marriage; but at Law he could only have Debt for thoſe that incurr'd during the Coverture.

Of Parceners.

163. PArceners are where a Man ſeis'd in Fee or T. has Iſſue only Daughters, or dies without Iſſue and leaves Siſters, *&c.* and the Tenements deſcend to ſuch Daughters

or

or Sisters, *&c.* and they enter. They are called Parceners because they are compellable by Writ *de Partitione faciendâ*, to make Partition; and all of 'em are but one Heir to their Ancestor, and yet they have Moieties, *&c.* in the Land descended.

If a Man have two Daughters, and one of 'em be attainted, the Moiety of his Lands shall descend to the other; † but it is said, that if a Lease L. be made, Rem'r to the right Heirs of *A.* being dead, and leaving Issue two Daughters, whereof one is attainted, the Rem'r is wholly void; *for none can purchase by the Name of Heir that is not compleatly Heir.* Donor reserves two Shillings Rent during his Life; and if he die, his Heir being within Age, then 20 *s.* to his Heirs; he dies leaving one Daughter within Age, and another of full Age, the Donee shall hold by Fealty only.

† 3 the other Moity escheat

* here is to be observ'd the Diversity between a Descent, which is an Act of Law, & a Purchase, the latter by Deed. 164.

In a real Action brought against Parceners, if one of 'em be within Age, she shall have her Age, and for the Nonage of one the Parol shall demur against both.

Land is given in T. Male, on Condition, that if the Donee die without Heir Female, the Donor shall re-enter; this is a void Condition, because it is repugnant to the Estate.

The Freehold of Parceners, whilst undivided, is entire as to a Stranger's *Præcipe*, and so it remains after the Death of any of 'em, but between themselves it is several as to many Purposes, for one may infeoff the other. The Issues of Daughters shall join in a *Præcipe*, when the common Ancestor, from

from whom they both muſt claim as Heirs, was laſt actually ſeis'd; but where the Daughters were ſeis'd and diſſeis'd, their Iſſues ſhall not join, becauſe they ſeverally claim as Heirs to their Mothers; yet when they have recovered, they are Parceners as their Mothers were, and ſhall join in Aſſiſe if diſſeis'd; and one *Præcipe* lies againſt 'em, and one of them may releaſe to the other.

By the Statute of *Gloc.* 6. If a Man die having many Heirs, whereof one is Son or Daughter, *&c.* and the others in a more remote Degree, they ſhall join in a *Mortanceſtor.*

There is a Deſcent *in Capita*, and *in Stirpes*, the firſt is to the Daughters themſelves, the ſecond to their Iſſues, the Daughters take equally, the Iſſues as much as their reſpective Mothers would have taken.

A Rent-Charge may be divided between Parceners, even before they have had actual Seiſin of it; but Eſtovers appendant to a Houſe, a Corrody, Common of Paſture or Piſcary uncertain, a Villein, Mill, or (*a*) Caſtle us'd for Defence of the Realm, *&c.* can't be divided, but the eldeſt ſhall have them, and make Allowance for the Value in ſome other Inheritance; but if the Anceſtor left no other Inheritance, then one ſhall have them one Year, and the other the next, or ſome ſuch Way.

(*a*) Vid ſup. 45.

165.

M. bargains and ſells a Manor to *B.* by Indenture with this Clauſe, provided always, and the ſaid *B.* covenants and grants to and with the ſaid *M.* his Heirs and Aſſigns,

Assigns, that they may dig for Ore and Turf, for the making of Allom in the Wastes, being Parcel of the Manor, by this *M.* has an Inheritance in this Power, and *B.* and his Heirs and Assigns may likewise dig. And *M.* may assign his Interest to one or more working with a Joint Stock, but he can't assign it in Part, or any Way divide it.

it being an incorporeal Inheritance.

If an Earl leave only Daughters, his Possessions shall be divided, and K. may give the Dignity to which of them he pleases; but if he leave but one Daughter, the Dignity descends to her, and her Posterity. If one hold by an Office of Honour, as of High Constable, the eldest Daughter shall before Marriage execute it by Deputy, after by her Husband.

Warranty annex'd to Parceners Lands remains after Partition; so *does Warranty annex'd to the Lands of Jointenants, if they make Partition by Force of the Statute*; but if Jointenants make Partition *at Common Law*, it is destroy'd. If one seis'd of a Manor, have by Prescription a Privilege of keeping a Woodward in Woods, Parcel of the Manor within a Forest, and of having the Bark of all Trees fell'd by the Forester within such Woods, and make a Feoffment of the Manor to two, and they make Partition thereof, yet the said Privilege remains.

Vid. 31 H. 8. 1.

because they are by Law compellable to make Partition & consequently shall not be prejudiced by it.

Partitions between Parceners are either expres or implied: Of expres Partitions, there are four by Consent, and one by Compulsion.

The

The 1ſt Partition by Conſent is when they agree to divide the Lands into equal Parts in Severalty, and that one ſhall have ſuch a Part, and another ſuch a Part, *&c.*

The 2d is when they agree that ſome Friends ſhall divide the Lands into equal Parts, and then the Eldeſt ſhall chuſe firſt one of the Parts ſo divided, *&c.* unleſs they otherwiſe agree. The Part choſen by the
166. Eldeſt is called *Enitia Pars*; but this Privilege is Perſonal to the Eldeſt, being given to her out of Reſpect to her Age, and deſcends not to her Iſſue, for if ſhe die, the next eldeſt ſhall chuſe firſt.

But if they have an Advowſon, the Law gives the firſt Preſention to the Eldeſt if they can't agree, and this Privilege goes to her Iſſue, Aſſignee, or Ten't by Curteſy.

The 3d Partition is when the Eldeſt divides, and in ſuch Caſe ſhe ſhall not chuſe.

The 4th is when after the Land is divided they caſt Lots for their Shares.

The expreſs compulſary Partition is by Writ *de Partitione Faciendâ*, the Words of
167. which are——*Cum eadem* A. *&* B. *inſimul & pro indiviſo Teneant tres Acras*
Vid. ſup. 1. *Terræ, &c. Note*; That the Word *Tenet* in a Writ always implies a Ten't of the Freehold; therefore, if one of them be diſſeis'd by the other, no Writ of Partition lies, and if one of them make a Leaſe L. the other ſhall not have a Writ of Partition
(a) Co. L. againſt her, (a) *but againſt her Leſſee ſhe*
175. Vide ſupra *ſhall*; and if one make a Leaſe Y. yet the
69. other

other may have a Writ of Partition againſt her.

There are alſo ſeveral implied Partitions in Law; as if there be three Parceners of a Meſnalty, and one of them purchaſe the Tenancy, this is a Partition in Law, and extinguiſhes the Meſnalty for a third Part, and the Lord muſt make ſeveral Avowries. And if one Parcener infeoft a Stranger of her Part, the other Parcener and the Feoffee are Ten'ts in Common. And if both of 'em marry, and have Iſſue, and die, leaving Husbands Ten'ts by Curteſy, the Parcenary is divided, and ſeveral *Præcipes* lie againſt the Ten'ts by Curteſy, *&c.* But if one recover againſt the other in Aſſiſe, or *nuper Obiit*, yet they remain Parceners, for as the Plaint was for a Moiety, the Judgment and Execution muſt be purſuant thereunto.

In a Writ of Partition, the firſt Judgment 168.
is *quod Partitio fiat inter Partes prædictas*; and thereupon a Writ is awarded to the Sheriff, that he in proper Perſon ſhall go to the Tenements, and by the Oath of 12 lawful Men of the Neighbourhood, in the Preſence of the Parties, ſhall make Partition between them, and allot one Part to the one Plaintiff, *&c.* making no Mention of the Eldeſt more than of the Youngeſt; and when the Partition ſo made is return'd under the Seals of the Sheriff and Jurors, Judgment ſhall be, *quod Partitio prædicta Firma & Stabilis in Perpetuum Teneatur*; and this is the principal Judgment, and no Writ of Error lies for the other, before this is given.

Partis

169. Partition between Parceners might *at Law* Vid. ſup 6. be by Parol, and Rent, or Eſtovers, which lie in Grant, might be reſerv'd or granted, without Deed, for Equality of Partition out of the Land deſcended, but not out of other Land, and Rent ſo reſerv'd, or granted, is diſtrainable of Common Right, tho' it be not Rent-Service. *But Q. If Parol Pͤtitions be not reſtrain'd by* 29 Ca. 2. 3. If one Parcener grant a Rent to the other *pro Reſiduo Terræ*, and do not grant it out of any Land in certain, yet it ſhall be intended to be out of her Purparty.

A Rent granted to Parceners for Equality of Partition, or reſerv'd by them on a Feoffment made by them of the Land which they had in Parcenary, ſhall deſcend, *&c.* in Courſe of Parcenary, tho' it were granted or reſerved in joint Words.

Jointenants or Ten'ts in Common could never make Partition by Parol, but by Deed they might; and Ten'ts in Common might have executed a Parol Partition by Livery.

170. A Partition made of Lands in Fee by Parceners of full Age binds them for ever, whether it be equal or unequal; ſo does an equal Partition of Lands in Tail, but if it be unequal, it concludes them only during their Lives to defeat it, but the Iſſue of her that has the leſſer Part, may after her Death diſagree and enter, and occupy in Common the Part allotted to her Aunt. Ten't in ſpecial Tail has Iſſue a Daughter, his Wife dies, and he has Iſſue another Daughter by a ſecond Wife, and dies, the Daughters make Partition, the Eldeſt is, in Reſpect

ſpect of the Privity of their Perſons, concluded to impeach it during her Life; but a Partition between mere Strangers is void. *A.* leaves two Daughters, Baſtard Eigne, and *Mulier Puiſne*, they enter and make Partition, the *Mulier* and her Heirs are concluded for ever. Co. L. 244.

An equal Partition made by the Parceners, and their Husbands, ſhall never be avoided, tho' afterwards it happen to become unequal, by over-flowing of Water, ill Husbandry, *&c.* and a Rent granted by Husband and Wife for Owelty of ſuch Partition ſhall charge the Land for ever. But the Wife muſt be a Party to ſuch Partition. If it be unequal at the Time when it is made, it ſhall bind the Husbands while they live, but the Parcener which hath the leſſer Part, may after her Husband's Death enter into her Siſter's Part, and defeat the Partition, not only for ſo much as will make her Share equal with her Siſter's, but for the Whole; but if ſhe enter into, and agree to the unequal Part, ſhe is bound for ever. Co. L. 169.

A Partition made by Force of K.'s Writ, between Parceners of full Age, or Infants, or *Femes* Covert, whether equal or unequal, ſhall never be avoided. A Partition equally made in Chancery between Parceners, who were K.'s Wards, at the full Age of the Eldeſt, bound them for ever, (if Part of the *Capite* Lands were allotted to each of them;) but if it were unequal, it might be avoided by *Scire Facias* out of *Chancery*, or by a Writ of *Partitione Faciendâ*, for no Judgment was given on ſuch Partition. 171.

A Par-

Co. L. 166. A Partition made by one of *non ſane* Memory binds herſelf, but not her Iſſue, unleſs it be equal. And an equal Partition made by one under Age ſhall never be avoided; if it be unequal it may be avoided by her, either during her Nonage, or after her full Age; but if ſhe take the whole Profits of the unequal Part after her ful Age, ſhe is bound for ever.

The full Age of Male or Female in common Speech is underſtood of the Age of 21
172. Years, for before that Age one can't bind himſelf by any Deed, nor alien Land or Goods; but he may bind himſelf *in a ſingle Bill*, to pay for neceſſary Meat, Drink, Ap-
1 Lev. 86. parel, Phyſick, good Teaching, *&c.* but a Bond with a Penalty for the Payment of ſuch Debt is not good. If he preſent not to a void Church, it ſhall lapſe after ſix Months. If he be an Executor, he may releaſe on Payment, not without; and generally what the Law binds him to do is good, if done by him voluntarily without Suit of Law.

One under Age can't be a Bailiff or Receiver, nor charged in Account as ſuch. A Bailiff is a Servant who has the Adminiſtration of Lands for the Owner's Benefit, and he is chargeable in Account for the Profits he has raiſed, or reaſonably might have done, his Expences deducted. An Account againſt a Receiver, is when one receives Money for another's Uſe to render an Account, but he ſhall not be allowed his Expences; for this Cauſe a Bailiff ſhall not be charged as Receiver, for then he ſhould loſe his

his Expences. In an Account againſt a Bailiff, the Plaintiff need not ſhew by whoſe Hands he receiv'd the Money; as in an Account againſt a Receiver he muſt, except he be a Merchant, and bring an Account againſt another trading with him with a Joint Stock to their common Profit; in which Caſe, naming himſelf a Merchant, he may have an Accout againſt the other, naming him a Merchant, and ſhall charge him as *Receptor Denariorum ipſius* B. *ex quacunque Cauſa & Contractu ad communem Utilitatem ipſorum* A. *&* B. *Provenientium*, and the other ſhall account for what he might have receiv'd, and be allowed his Expences. One Jointenant making the other Barliff of his Moiety ſhall have an Account againſt him. A Man can't be charged in an Account but as Guardian in Socage, Bailiff, or Receiver.

Minor jurare non poteſt, therefore he can't be a Juror, nor wage his Law; and if he make Default in a *Præcipe quod reddat*, in which Caſe one of full Age may wage his Law of *Non Summons*, he ſhall not be prejudiced by it, becauſe the Mean to excuſe the Default is taken away by Law.

Parceners of two Parcels of Land, one in Fee, the other in T. make Partition, by which the Land in Fee is allotted to the one, that entail'd to the other; this ſhall never be avoided by the Iſſue of her to whom the Land in T. was allotted, nor by the Iſſue of the other, if it were equal, and the Land in Fee deſcend, or the

Rev'n

Rev'n thereof expectant on a State L. or Y. but if ſhe that has the Fee alien in Fee or T. and have Iſſue and die, the Iſſue may avoid the Partition, and enter on the Land entail'd and hold in Purparty with her Aunt, for the Partition is no Diſcontinuance, nor can the Tail be barr'd without full Recompence, and it was the Folly of
173. the other Parcener to take the Land T. only, for ſhe might have challeng'd a Moiety of the other. So when a Woman, that has Title of Dower out of three Manors, takes one for her Dower, it is ſaid, ſhe ſhall hold it charged with her Husband's Incumbrances, for ſhe might have had a 3d of all Three, and have holden the ſame diſcharg'd.

A. leaves two Daughters, and two Acres, in one of which he has a good Title, in the other a bad one, one takes the one, the other the other, and after an Eſtate of Freehold is evicted from the Parcener that had the Acre with the bad Title, either as to the whole, or Part of her Purparty, ſhe may enter and avoid the Partition as to the
174. whole. But if ſhe alien her Part in Fee, before the Land is recovered, ſhe can't enter into the other Acre, for an Alienation in Fee diſſolves the Privity, but a Leaſe L. or Y. or Gift in T. does not. *And tho' in the Caſe above the Rev'n expectant on a State in T. made by the Parcener which had the Fee, be of ſo ſmall Conſideration in Law, that it ſhall not be eſteem'd a Recompence ſufficient to bar the Entry of the Iſſue into the Lands in T. allotted to the other Parcener, yet in this Caſe a Rev'n on a State T. inaſ-*

inaſmuch as it continues the Privity of the Coparcenary, ſhall give the Parcener, or her Iſſue, all the Privileges incident thereto.

When a Parcener having made Partition, or one that has made an Exchange, enter by Force of the Condition implied by Law on every Partition and Exchange, for the Eviction of any Part of what was allotted to them, they thereby avoid the whole Partition or Exchange. Yet if a Parcener be impleaded, and vouch the other by Force of the Warranty implied in Law, ſhe ſhall recover but *pro Ratâ, for that will make her Part equal with her Siſter's.* But where a Man vouches another by Force of the Warranty implied by Law on an Exchange, he ſhall recover a full Recompence for the Lands recover'd againſt him, *for it ſhall be intended that on the Exchange he gave to the other Lands to the full Value of them.*

Notwithſtanding a Parcener, that makes a Feoffment of her Part, doth thereby wholly diſmiſs herſelf from having any Part of the Land as Parcener; yet if her Feoffee be impleaded and vouch her, ſhe may have Aid of the other to deraign the Warranty Paramount, but not to recover *pro Rata.* And if a Parcener infeoff her Son and Heir Apparent, and die, the Son may vouch the other Parcener to deraign the Warranty Paramount, tho' he come to the Land by Feoffment, becauſe the Warranty betwixt him and his Mother was extinct by Act of Law. *A.* ſeis'd of Land in Fee has Iſſue two Daughters, and makes a Gift in T. to one of

of them, and dies ſeis'd of the Rev'n, and the Donee is impleaded, ſhe ſhall not have Aid of her Siſter to recover *pro Rata*, or to deraign the Warranty Paramount, for her Siſter is a Stranger to her Eſtate-tail.

2 H. 6. 16. Co. L. 390. a. *But in this Caſe ſhe may vouch herſelf and her Siſter if her Eſtate were made to her with Warranty.*

175. None but Parceners could at Law have the Writ *de Partitione Facienda*, but the Parcener might have it againſt her Siſter's Alienee, or Husband being Ten't by Curteſy, *non è Converſo*. If there be three Siſters, and the Eldeſt purchaſe the Part of the Youngeſt, ſhe ſhall have the ſaid Writ againſt the middle Siſter; and if the Huſband of the Eldeſt purchaſe the Part of the Youngeſt, he and his Wife may have it againſt the middle Siſter. By 31 *H.* 8. 1. & 32 *H.* 8. 32. All Jointenants and Ten'ts in Common may have the ſaid Writ, and Ten't by Curteſy by Equity of them, but a Parcener and her Siſter's Feoffee ſhall not join in ſuch Writ, for one has a Remedy by Statute only, the other only at Law.

Of Parceners by Cuſtom.

PArceners by Cuſtom are the Sons of one ſeis'd in Fee or T. of Land of the Nature of Gavelkind, which ſhall equally inherit, in Reſpect of the Cuſtom of the Fee, not in Reſpect of their Perſons, for they are not one Heir, as Daughters are; and the Writ *de Partitione Facienda* lies between them; but the Declaration muſt mention

the Cuſtom; as to ſay, that the Land is of the Cuſtom of Gavelkind; and Gavelkind and *Burgh Engliſh* differ in this Reſpect from all other Cuſtoms, that the Law takes Notice of them when generally alledged.

There is a Partition of a different Nature 176.
from any of thoſe afore-mention'd; as if one ſeis'd of Land in Fee have Iſſue two Daughters, and give Part thereof to one of them and her Husband in Frankmarriage, and die ſeis'd of the Remnant, being of greater Value than that given in Frankmarriage, in this Caſe the Remnant ſhall deſcend to the other Siſter only, and ſhe ſhall occupy it to her own Uſe, unleſs the Donees will put the Land given in Frankmarriage in Hotchpot, *i. e.* together with the ſaid Remnant, and if they offer to do it, and the Parcener refuſe to put the Land in Fee in Hotchpot with the Land given in Frankmarriage, the Donees can have no Writ of Partition, becauſe they do not hold *inſimul*, but they may enter into the Land in Fee, and hold in Parcenary with her; when the Lands are put in Hotchpot, and the Value of each Acre known, Partition ſhall be made in this Manner, *viz.* the Donees ſhall retain 177.
the Land given in Frankmarriage, and ſhall have ſo much of that in Fee deſcended, as will, together with the Land given in Frankmarriage, make their Share equal to that of the other Parcener. And after ſuch Partition, the Land given in Frankmarriage ſhall be as the other Land deſcended, and if the Donees be impleaded thereof, they ſhall have Aid of the other Parcener: In

like

like Manner, a Parcener that has Rent granted to her for Owelty of Partition, ſhall have the ſame in Courſe of Deſcent.

Co. L. 176. b. The Writ *de rationabili parte Bonorum* lies not without a Cuſtom: The Children reaſonably advanc'd by the Father in his Life with any Part of his Goods, ſhall have no further Part thereof. In *London*, a Child advanc'd by the Father with any Part of his Goods, ſhall have no Part of thoſe that he leaves at his Death, unleſs the Father declare by Will, or under his Hand, that it was but in Part of Advancement; and then ſuch Part ſhall be put in Hotchpot with the reſt.

178. If the Donees or Parceners die before they have made Partition, *&c.* their Iſſues ſhall have the ſame Benefit of putting in Hotchpot.

The Cauſe why Land ſo given ſhall be put in Hotchpot is, for that ſuch Gift by the Word Frankmarriage implies an Advancement of the Donee, and if ſhe will not put the Land in Hotchpot, it ſhall be intended that ſhe was ſufficiently advanc'd. But if the Father give Lands to his Daughter in Fee or T. *&c.* ſuch Lands ſhall never be put in Hotchpot, neither ſhall Lands which deſcend from any other Anceſtor than the Donor in Frankmarriage be put in Hotchpot.

179. If the Land given in Frankmarriage be of equal Value with that deſcended, there ſhall be no ſuch Putting in Hotchpot, for the Donees have an equal Share already. And it ſeems that the Donees ſhall have

the Rev'n of the Land given in Frankmarriage, for otherwiſe their Share would not be equal. But if the Lands given in Frankmarriage were of equal Value with the reſt of the Donor's Land at the Time of the Gift, and afterwards impair'd without any Default in the Donees, or if the Donor after purchaſe more Land in Fee, and die ſeis'd thereof, the Land given in Frankmarriage ſhall be put in Hotchpot, *&c.*

If Donor in Frankmarriage die ſeis'd of Lands in Tail, the ſame ſhall not be put in Hotchpot, but only thoſe whereof he dies ſeiſed in Fee.

If there be three Parceners, and the Youngeſt will have a Partition, and the other two will not, they may allot to her a 3d Part to hold in Severalty, and hold the Remnant in Parcenary; and after either of them two may have the Writ *de Partitione Facienda* againſt the other. But when Partition is made by Force of the Writ, the whole Land muſt be divided. 180.

Of Jointenants.

JOintenants are where a Feoffment is made to two or more and their Heirs, or a Leaſe is made to them for a Term of their Lives, and they enter. And if a Rent be granted to *A. & B. habendum* to *A.* till he be married, and to *B.* till promoted, *&c.* in this Caſe they are Jointenants, tho' the Limitations be ſeveral, and the Rent ſhall ſurvive by the Death of either of them, if

his Moiety were not determin'd before his Death by Marriage, *&c.*

An Alien and a Subject may purchaſe Lands jointly, *& nullum Tempus occurrit Regi* on Office found.

If two or more diſſeiſe another of Land, *&c.* to their own Uſe, they are Jointenants; if to the Uſe of one of them, he to whoſe Uſe, *&c.* is ſole Ten't, and the others Coadjutors; if it be to the Uſe of one that is abſent, and knows not of it, they are Jointenants before he agrees; but after he agrees, they ceaſe to be Ten'ts, and are only Coadjutors, and the other by agreeing to ſuch Diſs'in to his Uſe becomes Ten't, and is as much a Diſs'or as if he had commanded it, for *omnis Ratihabitio Retrotrahitur, & Mandato Æquiparatur*; But an Aſſiſe lies as well againſt the Coadjutors, as the Diſs'or, who is the Ten't, and if the Ten't die, it lies againſt the Coadjutors, and the Ten't of the Land, tho' he be no Diſs'or. If the Demandant in a *Præcipe* diſſeiſe the Ten't to another's Uſe, he ſhall not abate the Writ thereby, becauſe tho' he be a Diſs'or, he gains no Eſtate in the Land. Leſſee L. is diſſeiſed to the Uſe of the Leſſor, and the Leſſor afterwards agrees, yet he is a Diſs'or in Fee, for by the Diſs'in the Fee was deveſted; and the aforeſaid Rule, that a ſubſequent Agreement ſhall be equivalent to a Command precedent, ſhall not have ſuch a Retroſpect, for the Benefit of him that agrees to ſuch wrongful Eſtate, as to reveſt his Rev'n, which was deveſted before.

Diſs'in

Diſs'in of Land, *&c.* is when one enters that has no Right of Entry, and ouſts the Ten't; but an Entry alone is not a Diſs'in without a Claimer, or taking of the Profits. 181.

If one Jointenant die, his whole Intereſt ſhall ſurvive to the others. But the Eſtate of a Parcener, or Ten't in Common, ſhall deſcend to their Iſſue, *&c.* Land is lett to *A.* and *B.* for *A.*'s Life, *B.*'s Intereſt ſhall ſurvive, but *A.*'s cannot. A naked Truſt or Authority can't ſurvive, but a Truſt coupled with an Intereſt ſhall ſurvive together with it. If a Letter of Attorney be made to 4 or 3, to deliver Seiſin jointly or ſeverally, two of them can't do it, for it is neither jointly by them all, nor ſeverally by any of them. But where the Sheriff makes a Warrant to 4 or 3 on a *Capias* jointly or ſeverally to arreſt one, two of them may arreſt the Party, for the greater Expedition of Juſtice; and for the ſame Reaſon, if a *Venire Facias* be awarded to 4 Coroners to return a Jury, and one of them die, the reſt may execute it. Vid. ſupra 169.

Joint Intereſts in Chattels, Goods, Debts, Covenants and Contracts, ſhall go to the Survivor; but if two Merchants trade with a Joint Stock, and one of them die, his Share ſhall go to his Executors. 182.

If Land be given to two Men, or to two Women, or to two Men and one Woman, or to a (*a*) Man and his Mother, and the Heirs of their Bodies begotten, in all theſe Caſes the Donees have a Joint Eſtate for Life, and ſeveral Inheritances, inaſmuch as (*a*) Vid. Co. L. 184. a.

183. they can't have one Heir begotten between them, *and the Survivorſhip of the Inheritance can't hold Place where Land is given to two Men, and the Heirs of their Bodies, without defeating the Will of the Donor as to the Iſſue of him that firſt dies, for whoſe Benefit the Gift was made as well as the Donees: But where Land is given to two Men and their Heirs, the Survivor ſhall have the whole, becauſe in ſuch Caſe the Limitation to the Heirs is wholly for the Feoffee's Benefit, and means only that the abſolute Property ſhall be transferr'd to him.* As the Inheritances in the Caſe above are ſeveral, ſo the Rev'n depending thereon is ſeveral alſo; and if any of the Donees die without Iſſue, the Donor ſhall, after the Death of all the Donees, enter into a Moiety, or a 3d Part, *&c.* If the Donor grant over his Rev'n to two, the Grantees are Jointenants of the Rev'n *of each Eſtate T.* And if a Leaſe be for L. Rem'r in T. Rem'r in Fee to two, they are Jointenants for L. Ten'ts in Common of the Eſtate T. Jointenants of the Fee.

184. If a Leaſe be made to two, and to the Heirs of one of them, they are Jointenants for L. and one has a Freehold, the other a Fee; and if he that has the Fee die, and then the other, and a Stranger enter, the Heir of him that had the Fee may either have *Mortanceſtor*, or a Writ of Right, in both of which he ſuppoſes the Fee to have been executed, or he may bring a Writ of Intruſion, and term it a Rem'r; or if the Conveyance were by Fine, he may bring a *Scire*

Scire Facias, which proves the Fee not to be executed, ſo that it is in his Choice to take it either Way. The Cauſe why the Inheritances in the Caſes aforeſaid drown not the States for L. is for that they are all made by one Conveyance, *and by the expreſs Purport of the Deed* a Joint Eſtate is given to the Parties for their Lives; but the Inheritance is divided from the Eſtate L. only in Suppoſition of Law to this Purpoſe, for the Party can't convey it away after his Deceaſe, *and retain his Joint Eſtate for L.* and where the Inheritance and the particular Eſtate are divided in ſeveral Conveyances, the one drowns the other; therefore if leſſor L. grant the Rev'n to his two Joint Leſſees and the Heirs of their two Bodies, they become Ten'ts in T. in Poſſeſſion: And if ſuch Leſſor grant his Rev'n in Fee to one of his Leſſees; or if one make a Leaſe L. and grant the Rev'n in Fee to his Leſſee and a Stranger; or if Leſſee L. grant his Eſtate to his Leſſor, and a Stranger, or to one of his Leſſor's Joint Grantees of the Rev'n in Fee; in all theſe Caſes the Fee is executed for a Moiety in him in whom the Fee and Eſtate L. meet together, and as to the other Moiety there is an Eſtate L. in the one, and the Rev'n of the Fee in the other, and no Joint Eſtate remains. Co. L. 182, b.

The *Habend'* may ſever the Premiſſes, as when Land is lett to two, *habend'* to one for L. Rem'r to the other for L. Co. L. 183. b.

If one Jointenant grant a Rent, or Common, or Corrody, or ſuch-like, out of his Part, or a Way over the Land, and die, the Co. L. 184. b.

Survivor ſhall hold the Land diſcharg'd; and if he ſuffer Judgment in an Action of Debt, or acknowledge a Recognizance, and die before Execution, there can be no Execution after his Death, for the Rule is *Jus accreſcendi præfertur oneribus.*

So if the Husband grant a Rent out of a Term for Y. which he has in his Wife's Right, and die, ſhe ſhall avoid it; and the Lord entring on Land purchas'd by his Villein, ſhall avoid a Recognizance acknowledged by him, and not executed, but he ſhall not avoid a Leaſe Y. made by him.

Co. L. 186. But if a Jointenant make a Leaſe Y. *in Præſenti* or *Futuro*, of the Land, or the Herbage, and die, it can't be avoided by the Survivor, becauſe the Leſſee has an Intereſt in the Land it ſelf veſted in him, and a Right to enjoy the Poſſeſſion thereof by Force of the Leaſe. But if a Jointenant make a Leaſe to commence on a Condition precedent, and die before it be perform'd, the Survivor is not bound by it; and it is ſaid, that if a Jointenant be indebted to K. and die, the Land cannot be extended in the Hands of the Survivor. If a Jointenant take a Leaſe of his Moiety, the Survivor ſhall not be eſtopped by it, but he ſhall be bound by a Recovery had againſt the other, becauſe the Right is bound by it. The Reaſon of all theſe Caſes is becauſe, the Survivor claims not from his Companion, but from the Feoffor, and may plead the Feoffment to himſelf without mentioning the other; and if a Jointenant make a Leaſe Y. of his Moiety, reſerving a Rent, and die,

Q. Dy. 224. Pl. 32. Pl. C. 261. a. 263. b.

it

it ſhall go to his Executors, not to the Survivor becauſe he claims above it.

If a Jointenant grant a Rent, and then releaſe to his Companion, the Grant remains good, becauſe the Releaſee claims not by Survivor, and yet in Judgment of Law he is in from the firſt Feoffor to moſt Purpoſes, and the Eſtate of him that releas'd is drown'd; ſo if Leſſee grant a Rent-Charge and Surrender to his Leſſor, yet his Grant remains good; but there is no Queſtion where there are three Jointenants, and one of them grants a Rent-Charge, and then releaſes to one of his Companions only, but that the Charge remains good, becauſe the Releaſee claims not from the Feoffor, but only from the Releaſor.

A Deviſe of Land whereof the Deviſor is jointly ſeis'd, or poſſeſs'd, is void; for the Title of the Survivor is Paramount that of the Deviſee, tho' they meet in an Inſtant. In like manner a Deviſe of an Heir-loom, Heriot, or Mortuary, is void.

Two Femes are Joint Leſſees Y. one of them takes Husband and dies, the Survivor, not the Husband, ſhall have the Whole, for the Survivor has the elder Title.

Jointenants are ſeiſed *per My & per Tout*, 186.
i.e. each of them is ſeiſed by every Parcel, and in every Parcel, and in the Whole jointly with his Companion; but each of 'em has a Right but to a Moiety, *&c.* as to infeoff, demiſe, give, forfeit, or loſe by Default. If two Jointenants join in a Feoffment, a Re-entry by Force of a Condition can be reſerv'd to one of 'em into no more

than a Moiety, becauſe in Judgment of Law but a Moiety paſs'd from him: And in ſuch Caſe, if one of 'em die, the Feoffee can't plead a Feoffment of the whole from the Survivor: But each of 'em may warrant the Whole, for a Man may warrant more than paſſes from him. If one of them make an Indenture of Bargain and Sale, and the other die before Inrollment, a Moiety only ſhall paſs. If a Villein or an Alien purchaſe Lands jointly with another, the Lord or K. ſhall enter but into a Moiety.

One Jointenant may make the other Bailiff, or Leſſee Y. or W. of his Moiety.

If two Jointenants be of an Advowſon, and one preſent a Clerk who is Inſtituted, and die, this ſhall ſerve for a Title in a *Quare Impedit* by the other. If one Jointenant or Ten't in Common preſent alone, or if they both ſeverally preſent, the Ordinary may admit or refuſe the Preſentee of either of 'em; and if they don't agree within the 6 Months, the Church will lapſe. Tho' the eldeſt Parcener may preſent alone if they don't agree; yet if there be four Co-parceners, and the Eldeſt and Youngeſt preſent, the Ordinary may refuſe their Clerk, becauſe the Eldeſt waves her Privilege by joining with the Youngeſt.

187. Jointenants of a State of Freehold could never make Partition by Parol, *either before or ſince* 29 Ca. 2. 3. but it is ſaid that Jointenants for Years might; and a voluntary Partition by Deed made between them remains as it was at Common Law; therefore tho' a compulſary Partition by Force of

31 *H.* 8. 1, *&c.* ſaves the Warranty *by the expreſs Words of the Statute*, yet ſuch voluntary Partition deſtroys it.

If an Eſtate be made to Husband and Wife, and a 3d Perſon and their Heirs, he takes one Moiety, and Husband and Wife another, for they are but one Perſon in Law; therefore there are no Moieties in Law of a Joint Eſtate made to them both during the Coverture. For this Cauſe, if the Husband be attainted and executed, the Wife ſhall by her Petition regain all ſuch Lands conveyed jointly to her and her Huſband; ſo if the Lord enter on the Husband being his Villein, and having made ſuch Purchaſe, the Wife ſurviving ſhall recover the Whole. It is ſaid, that if a Deed of Feoffment, or grant of a Rev'n, be made to 'em, whilſt they are ſole, and then they intermarry before Livery, or Attornment, that they take no Moieties; but if they had been ſeiſed of an Uſe by Moieties before 27 *H.* 8. 10. and ſuch Uſe had been executed by the Statute, they ſhould have had the Eſtate of the Land by Moieties, for they ſhould have the Eſtate in ſuch Plight as they had the Uſe. If they vouch and recover by Force of a Warranty made to 'em when ſole, yet they ſhall have no Moieties in the Eſtate recovered. A Leaſe is made to *B.* and to Husband and Wife, *viz.* to *B.* for L. Husband in T. Wife for Years, in this Caſe each of the Three has a ſeveral Eſtate.

Right of Entry or Action in one cannot ſtand in Jointure with a Freehold or Inheritance in Poſſeſſion of another, but Right of 188.

Entry may ſtand in Jointure with a Right of Action, for the Parties may join in a Writ of Right: A Rent ſuſpended by Unity of Poſſeſſion, can't ſtand in Jointure with a Rent in Poſſeſſion, nor a Freehold with a Leaſe Y. nor a Freehold and Inheritance in Poſſeſſion with a Rev'n expectant on a Freehold, nor a Seiſin in a natural Capacity with a Seiſin in a Politick Capacity.

Two Jointenants, the one for L. the other in Fee loſe by Deſault, one ſhall have a Writ of Right, and the other a *quod ei Deforceat*, yet after Recovery they are Jointenants again.

Joint Eſtates muſt veſt at once, therefore if a Leaſe L. be made, Rem'r to the Heirs of *J. S.* and *J. N.* then living, the Heirs can't be Jointenants; but if *A.* make a Feoffment to the Uſe of himſelf and ſuch Wife as he ſhall marry, and afterwards take a Wife, he and his Wife are Jointenants, *tho' he were ſeis'd of a qualified Fee before the Marriage and the Wife had nothing; for by the Marriage the contingent Eſtate veſted in them both at the ſame Time by the ſaid Limitation.* So if a Diſſeiſin be to the Uſe of two, tho' they ſeverally agree, they are Jointenants, *for an Agreement ſubſequent is equivalent to a Command precedent.*

Where Jointenants or Parceners purſue one Remedy, and one is ſummon'd and ſever'd, and the other recovers, he that was ſummon'd and ſever'd ſhall enter with him, but where the Remedies are ſeveral, the one ſhall not enter with the other till both have recover'd.

Of

Of Ten'ts in Common.

TEn'ts in Common are thoſe that come to the Land by ſeveral Titles, or by one Title and ſeveral Rights, and they have the Poſſeſſion in Common, but ſeveral Eſtates. As if there be three Jointenants, and one alien his Part, the other two are Jointenants of their Parts that remain, and hold them in Common with the Alienee. And if Jointenants make ſeveral Feoffments or Gifts in T. or Leaſes L. the Feoffees, Donees, or Leſſees, are Ten'ts in Common. 189.

If Land be given to two Biſhops, or Abbots, or Parſons, and their Succeſſors, they are Ten'ts in Common at firſt, and have no Joint Eſtate for L. for they take in their Politick Capacities in Right of their Churches, or Houſes; ſo if Land be given to the King, and a Subject and their Heirs, or if the Crown deſcend to a Jointenant, or if Lands be given to a Layman and a Parſon, and to the Heirs of one, and Succeſſors of the other, they are Ten'ts in Common, for the Fee veſts in them in ſeveral Capacities. So if Land be given to *J.* Biſhop of *N.* and his Succeſſors, and to *J. O.* Dr. of Divinity and his Heirs, he being the ſame Perſon is Ten't in Common with himſelf. But if a Leaſe Y. be granted to a Layman and Biſhop, they are not Ten'ts in Common but Jointenants, for they both take it in their natural Capacities. 190. +

A Cor-

A Corrody granted to two and their Heirs is ſeveral, for the Corrody is uncertain and perſonal.

If Land be given to two, *Habend'* the one Moiety to one and his Heirs, and the other Moiety to the other and his Heirs, they are Ten'ts in Common; ſo if a Man ſeiſed in Fee, infeoff another of a Moiety, or 3d or 4th Part without any Aſſignment of it in Severalty, the Feoffee and Feoffor are Ten'ts in Common. If a Verdict find that one has *duas Partes Manerii in tres Partes Divis'*, it ſhall not be intended to be in Common, as it would have been if the Words were *in tres Partes Dividend'*. *A.* ſeiſed of a Manor to which an Advowſon is appendant, makes a Feoffment of three Acres, Parcel of it to two, *habend'* the one Moiety with the Moiety of the Advowſon to one, and the other Moiety with a Moiety of the Advowſon to the other, this diſannexes the Advowſon from the Manor, and annexes it to the three Acres. At Law, ſuch Feoffment of an uncertain Part with Livery was good without Deed, but an Advowſon could never be diſannexed from a Manor, and annex'd to Part of it without Deed.

If there be two joint Leſſees L. and one
191. grant all that belongs to him to another, the Grantee and the other Leſſee are Ten'ts in Common as long as both Leſſees are alive, and the Leſſor ſhall enter into a Moiety by the Death of either of them, becauſe by ſuch Grant the Jointure was ſevered.

ſevered: And it makes no Difference in this Caſe, if the Joint Leaſe were made by theſe Words, *habend'* to them two for their Lives, and to the Survivor, for *expreſſio eorum quæ tacite inſunt nihil operatur.*

If there be two Parceners in Fee, and one of them make a Leaſe L. this ſevers not the Parcenary nor the Lord's Avowry; yet if one Jointenant make ſuch Leaſe, he thereby ſevers the Lord's Avowry, [*ſed Q. for the Rev'n in the Leſſor, and the Freehold and Inheritance of the other, are holden of the Lord as they were before:*] And a Jointenant, by making ſuch Leaſe, ſevers the Jointure for 3 Reaſons. 192. Perk. 653.

1. The Freehold is thereby ſever'd from the Jointure, and conſequently the Rev'n depending on the Freehold is ſevered alſo.

And if there be two Jointenants for Y. and one of them leaſe his Part for Y. the Jointure is ſevered, for the Leaſe Y. in Poſſeſſion in the one, can't ſtand in Jointure with the Rev'n in the other Expectant on a Leaſe Y.

2. If ſuch Leſſee of one Jointenant be impleaded and make Default, his Leſſor ſhall alone be received.

3. If a Rent were reſerved on ſuch Leaſe the Leſſor alone ſhall have it; but if two Jointenants join in a Leaſe L. reſerving a Rent to one of them, both ſhall have it in reſpect of their Joint Rev'n, unleſs the Reſervation be by Indenture; and if they reſerve the Rev'n by Deed Poll or Indenture to one of them only, both ſhall have it, becauſe

becauſe the Reſervation of the Rev'n is void, for they had the Rev'n before.

If the Leſſee of two Jointenants ſurrender to one of them, it ſhall enure to them both, *for ſuch Conveyance is void, if made to any but him in Rev'n or Rem'r, and wholly operates by drowning the particular Eſtate in the Rev'n, &c.* But if ſuch Leſſee grant his Eſtate to one of them, the other ſhall have no Advantage thereof. If two Jointenants make a Leaſe L. Rem'r to one of them in Fee, this is a good Grant of the Rem'r from one to the other.

193. After the Jointure has been ſever'd by the Leaſe of one Jointenant, if the Leſſee die in the Life of both Jointenants, they become Jointenants again; but if either of them die before the Leſſee, and his Part deſcend to his Iſſue, *&c.* the Jointure is gone for ever.

If one Jointenant make a Leaſe for his own L. and die, there ſhall be no Survivor, tho' the Leaſe that ſevered the Jointure be determined by his Death. 1. Becauſe at the Time of his Death the Jointure was ſever'd.

Vid. Co. L. 181. b. 2. Becauſe, *Regularly* there muſt be equal Benefit on both Sides; but in this Caſe it is clear, that if the other Jointenant had died, there could have been no Survivor.

A Releaſe by a Jointenant to one of his Companions only enures by Way of *Mitter le* Eſtate, and if a Joint Eſtate be made to Husband and Wife, and a 3d Perſon, and he releaſe to the Husband only, the Husband alone hath his Moiety, and if he releaſe to the Wife, ſhe hath the whole Moiety.

Vide ſupra 273.

Moiety of the 3d Perſon, and the Husband hath nothing therein but in her Right. But a Releaſe by a Jointenant to all his Companions, enures not by Way of *Mitter le* Eſtate, as to moſt Purpoſes; for they to whom the Releaſe is made are ſuppoſed to be in from the firſt Feoffor, and ſhall deraign the Warranty Paramount.

Some Releaſes enure by Way of *Mitter le Droit*, as a Releaſe by a Diſs'ee to one of his Diſs'ors, which by the Delivery of the Deed veſts the whole Inheritance in the Releaſee, and deveſts the Eſtate of the other, becauſe he came to it merely by Wrong. But if there be two Uſurpers, a Releaſe by the rightful Patron to one of them enures to both, for they come not in merely by Wrong, but by the Admiſſion and Inſtitution of the Biſhop, which are judicial Acts. 194.

And ſome Releaſes enure by Way of Extinguiſhment; as if a Diſs'or make a Feoffment to two, or a Leaſe L. Rem'r in Fee, and the Diſs'ee releaſe to one of the Feoffees, or to the Leſſee L.

A Rent may be reſerved on Releaſes that enure by Way of *Mitter le* Eſtate, but not on thoſe that enure by *Mitter le Droit*, or Extinguiſhment.

Ten'ts in Common may be ſuch by Title of Preſcription. 195.

In all Actions real or mix'd, Tent's in Common ſhall ſever, becauſe their Titles and Eſtates are ſeveral; but Jointenants ſhall join, becauſe their Titles and Eſtates are joint. *A. B.* and *C.* are Jointenants, *A.* aliens

aliens to *B.* and then *B.* and *C.* are diſſeis'd, they ſhall join in an Aſſiſe for the two Parts, and *B.* alone ſhall have one for the Third. If Parceners being in by divers Deſcents be diſſeis'd, they ſhall join in an Aſſiſe, for they are Parceners as their Mothers were, and as one Heir to their common Anceſtor.

If two Ten'ts in Common join in a Gift T. or Leaſe L. reſerving 20 *s.* or a Pound of
197. Pepper, or any other ſeverable Rent, and be diſſeiſed, they ſhall not join in an Aſſiſe, but each of them ſhall have one for a Moiety of the Rent; for as the Rev'n is ſeveral, the Rent incident thereto is ſeveral alſo. But the Plaint muſt be, *de Medietate Viginti Solidorum, &c.* not *de Dimidio,* or 10 *s. &c.* But if a Thing entire, as a Horſe, *&c.* be reſerv'd, they muſt of Neceſſity join in an Action for it, for one can't make a Plaint of the Moiety of a Horſe. They ſhall alſo join in a *Quare Impedit,* and Writ of Right of Ward, and Raviſhment of Ward, and if one of them releaſe to the Defendant, the other ſhall take Benefit thereof and recover the whole; *for ſuch Actions are partly real, and therefore the Releaſe of one ſhall not bar the other.* They ſhall alſo join in Detinue of Charters, and if one be Nonſuit, the other ſhall recover. It is ſaid, that they ſhall join in *Warrantia Cartæ,* and ſever in Voucher.

N. all these are things intire.

If two Tent's in Common grant a Rent of 20 *s.* out of their Land, the Grantee ſhall

ſhall have two Rents of 20 *s.* *for their Grants ſhall be taken moſt ſtrongly againſt themſelves, and ſhall enure ſeverally in Reſpect of their ſeveral Intereſts*; but if they reſerve 20 *s.* on a Gift, or Leaſe made by them both, they ſhall have but one Rent of 20 *s.*

Ten'ts in Common ſhall join in Actions Perſonal, as Treſpaſs, Account againſt their Bailiff, and ſuch Actions ſhall ſurvive; and if they bring a *Quare Impedit*, and ſix Months paſs, and one die, the Writ ſhall not abate, tho' it be partly real, becauſe, if it ſhould, this Wrong would be remedileſs. 198.

If three Parceners recover Land and Damages in *Mortanceſtor*, and one of them die, her Iſſue ſhall have Execution, not only of the Land but alſo of the Damages, as Acceſſary to the Land, and yet the Words of the Judgment are joint, *viz.* to recover Lands and Damages; but if the three Siſters had ſued Execution of the Damages by Elegit, and one of them had died, the Land taken in Execution would have ſurvived to the other, *as a joint Chattel veſted in them.* If (*a*) the Aunt and Niece join for Waſte done in the Siſter's Life, the Aunt alone ſhall recover Damages, *becauſe they are given in reſpect of the Privity which is Perſonal.* If Ten'ts in Common make a Leaſe Y. reſerving Rent, they ſhall join in an Action of Debt for it, *for that is grounded on the Contract which is Perſonal*, but ſever in Avowry, *for the*

(*a*) Vide ſupra 94.

the Diſtreſs is made in reſpect of the Rev'n which is in Common.

199. There may be Ten'ts in Common of Chattels real or perſonal, entire or ſeveral, as Leaſes Y. Wards, Horſes, *&c.* as when any of thoſe who were Jointenants of them grant over their Intereſt to a Stranger, the Grantee and the other are Ten'ts in Common.

When a Waif, *&c.* or Eſtray, falls to them who have a Manor in Common, or Land eſcheats to them, they are Ten'ts in Common thereof.

Ten'ts in Common of a Term can't join in *Ejectione Firmæ*, or *Quare ejecit infra Terminum*, becauſe theſe Actions concern the Right which is ſeveral. If two be poſſeſs'd in Common of a Term for Years of Land, or of any other ſeverable real Chattel, and one eject the other by driving off his Cattle, or not ſuffering him to occupy, the other ſhall have Ejectment and recover Damages againſt him for the firſt Entry, but not for the mean Profits. But if one of them only take the whole Profits, he does not eject the other thereby, nor can the other have Treſpaſs againſt him, for each of them may occupy the whole, *per My & per Tout.* And if two be poſſeſs'd in Common of a Chattel perſonal, or an entire real Chattel, and one
200. take it out of the other's Poſſeſſion, he has no Remedy but to take it again when he ſees his Time.

If there be two Ten'ts in Common of a Park or Dove-Houſe, and one of them deſtroy all the Deer, or take all the old Doves

Doves and deſtroy the Flight; or if two have Land and Meer-ſtones in Common, and one of them carry them away; or if they have a Folding in Common, and one diſturb the other to erect Hurdles; in all theſe, Caſes Treſpaſs *quare Vi, &c.* lies.

If two ſeveral Owners of Houſes have a River in Common, and one of them corrupt it, the other ſhall have an Action on the Caſe. If one be willing to repair a Houſe which he holds in Common, or jointly with another, he may have a Writ *de Domo Reparanda* againſt him. But one Jointenant or Ten't in Common could not have an Action of Account againſt the other *before* 4 *&* 5 *Annæ* 16. unleſs he were his Bailiff. *But by that Statute they and their Executors, and Adminiſtrators, may have an Account againſt the others as Bailiffs, for receiving more than their Proportion, and againſt their Executors and Adminiſtrators.*

If Land be given to two for Life, and to the Heirs of one of them, and Ten't for Life do Waſte, he that hath the Fee can't have an Action of Waſte on the Statute of *Glouceſter*, but he may have one on *W.* 2. 22. which enacts, That if there be two Ten'ts in Common of a Wood, Turbary, Piſcary, *&c.* and one do Waſte, the other ſhall have a Writ of Waſte, and the Waſter ſhall have Election before Judgment either to have his Part in certain aſſign'd to him by the Oath of 12 Men, (and then the Place waſted ſhall be aſſign'd for Part thereof,) or to grant that he will take no more for the

the Future than his Companion ſhall approve of. This Act by Conſtruction extends to Jointenants, not to Parceners, becauſe they might have the Writ *de Partitione Facienda.*

If one plead a Leaſe, Gift, or Feoffment of Tenements which lie in Livery, or a Grant of Things which lie in Grant, he ſhall conclude *virtute cujus fuit inde Seiſitus*, but he that pleads a Leaſe Y. *of Land*, ſhall ſay, *virtute cujus Intravit, & fuit inde Poſſeſſionatus*, for a Man is not poſſeſs'd by Force of ſuch Leaſe before Entry.

One Jointenant can't infeoff the other, for one has no Freehold diſtinct from that of the other, but one may releaſe to the other, *and by ſuch Releaſe the whole ſhall veſt in the Releaſee, for they both claim by the joint Words of the ſame Conveyance; which Words, if they be void as to one at firſt, or ceaſe to have any Effect as to him by Matter* ex Poſt facto, *are ſufficient to veſt the whole in the other.* One Ten't in Common may infeoff the other, but can't releaſe to him, *for their Eſtates are as diſtinct as if they were ſeverally ſeis'd of ſeveral Lands.* One Parcener may Releaſe to the other, *for they have an entire Fee as they take it as one Heir to the ſame Anceſtor*, and one may infeoff the other, *becauſe their Eſtate is ſeveral, as it is ſeverally deſcendible to their reſpective Iſſues.*

Of

Of Eſtates upon Condition.

BY a Condition, as it is generally taken in this Chapter, is underſtood a Quality annexed to the Realty by him that has an Eſtate, Intereſt or Right therein, whereby an Eſtate may be defeated, or enlarg'd, or created upon an uncertain Event. Of Conditions, ſome are implied in Law, others are in Deed, *viz.* expreſly contained in the Deed by which an Eſtate is conveyed; as when the Feoffor, Donor, or Leſſor, reſerves a Rent payable at ſuch Feaſts, on Condition that if it be behind at the Day of Payment, or a Week after, *&c.* that then he ſhall re-enter into the Whole, or Part; in this Caſe, if it be not paid at or before the Time, he ſhall re-enter according to the Purport of the Condition, and defeat the Eſtate of the Feoffee, *&c.* 201.

There can be no Re-entry for Non-payment of Rent without a Demand upon the Land; for the Land is the principal Debtor, and the Rent iſſues out of it, and in Aſſiſe for the Rent, the Land ſhall be put in View; and an Eviction of the Land evicts the Rent, and the Perſon of the Feoffee ſhall not be afterwards charged.

The Demand muſt be made on the moſt notorious Part of the Land; as if there be a Houſe, it muſt be made at the Fore-door thereof; if the Feoffment be of a Wood only, it muſt be at the Gate or High-way, or other moſt notorious Place; if two Places are equally notorious, it may be made at either of 'em. If Rent 202.

be reſerv'd to K. payable at K.'s Receipt at *Weſtminſter*, yet if he grant over the Rev'n, the Grantee ſhall demand it on the Land. If the Rent be demanded at a Place not the moſt notorious, and in Pleading a Demand be alledged at the Houſe, the Feoffee may traverſe the Demand, for it was void. If it be reſerved payable at a Place from the Land, yet it is Rent, and muſt be demanded at the Place appointed, obſerving the ſaid Rules concerning the moſt notorious Place. The Time of Demand appointed by Law, is ſuch a convenient Time before the Sun-ſetting of the laſt Day of Payment, that the Money may be numbred and receiv'd, *and yet the Rent is not due till the laſt Minute of the natural Day, before which Time, if the Feoffor die, his Heir, not his Executor, ſhall have it.* And if the Feoffee tender the Rent to the Feoffor upon any Part of the Land at any Time of the Day, and the Feoffor refuſe to receive it, he ſhall not take Advantage of any Demand for the Rent on that Day.

1 Saund. 287.

The Reaſon why the Law is ſo punctual in theſe Caſes, in appointing a certain Time and Place, is, That the Feoffee may not loſe his Land, by being ſurprized with an unexpected Demand, and the Feoffor may be at a Certainty, either to have the Rent, or his Land again for Default of Payment. But if a Rent be granted payable at a certain Day, and if it be behind and demanded, that the Grantee ſhall diſtrain, he may demand after the Day to enable himſelf to diſtrain.

Re-

Regularly the Feoffor re-entring ſhall be ſeis'd of the ſame Eſtate he had before the conditional Eſtate was made; yet if one ſeis'd in his Wife's Right make a Feoffment on Condition, and die, and his Heir enter for the Condition broken, his Eſtate preſently vaniſhes, and veſts in the Wife, for it is impoſſible that he ſhould be ſeiſed as the Feoffor was in Right of the Wife. If *ceſtuyque* Uſe before the 27 *H.* 8. 10. had made ſuch Feoffment and re-entred, the Eſtate would have been wholly in him, and yet before the Feoffment he had only an Uſe, for by the Feoffment the Privity between him and the Feoffees was wholly diſſolv'd. If Ten't in ſpecial T. make ſuch a Feoffment, and then his Wife die without Iſſue, and he re-enter, he becomes Ten't in Tail *Apres.* Such Feoffment of Land holden by Homage Anceſtrel, or of Copyhold Land eſcheated, deſtroys the Privilege, becauſe by the Feoffment the Continuance of the Preſcription or Cuſtom is interrupted. Lord ſeis'd of Rent, grants it on Condition, Ten't attorns, the Condition is broken, he may diſtrain, but can't have (a) Aſſiſe without a new Seiſin. Ten't T. makes a Feoffment on Condition, and dies, the Condition is broken, his Iſſue enters, if he be within Age he ſhall be remitted, but if he be of full Age, he ſhall not, *for by his Entry, in Reſpect of the Condition deſcended to him as Heir in Fee, he waives his Title as Heir in T. by Force whereof he might have recovered in Formedon.* Ten't L. makes ſuch

in reſpect of Impoſſibility.

Neceſſity

Vide ſupra 159.

in reſpect of ſome collateral Qualities

(a) Contra 4 Rep. 9. b.

Thro' folly of ye Party

ſuch Feoffment, and re-enters for a Breach, he ſhall be Tenᵗ L. again, but ſubject to the Forfeiture; *for the Leſſor's Right of Re-entry, once veſted in him for the ſame, ſhall not be loſt by the Leſſee's Re-entry for the Condition broken.*

203. One may reſerve Rent on Condition that if it be behind he ſhall re-enter and hold the Land till he be ſatisfied, or paid the Rent behind; and in this Caſe, if all or Part of the Rent be unpaid at the Day, he may re-enter, but when-ever the Feoffee pays, or tenders on the Land all the Arrears, he may enter again. And *Note*, That tho' the Feoffor accept Part of the Rent, he may enter and hold the Land till he be paid the Whole. The Feoffor by his Re-entry gains no Freehold, but an Intereſt by Agreement of the Parties to take the Profits in Nature of a Diſtreſs. Therefore if one had made a Leaſe L. on ſuch Condition, and re-enter'd for Non-payment, he could not have had an Action of Debt for the Rent *before* (*a*) 8 *Qu.* A. for ſuch Re-entry defeats not the Leſſee's Freehold.

(*a*) Vide ſupra 72.

When the Feoffor or Leſſor, *&c.* re-enter by Force of ſuch a Condition, the Profits ſhall not go in Part of ſatisfaction; but if the Words were, that he ſhould hold the Land till he be ſatisfied thereof, the Profits ſhould be accounted Parcel of the Satisfaction, and during the Time that ſuch Leſſor takes the Profits, he ſhall not have Debt for the Rent in Satisfaction whereof he takes the Profits.

If

If a Feoffment be made to *B.* and his Heirs, *ſub Conditione quod idem* B. *ſolvat Talem Redditum, &c.* or *Proviſo ſemper quod idem* B. *Solvat, &c.* or *ita quod idem* B. *Solvat, &c.* in theſe Caſes the Feoffor may re-enter for Non-payment, tho' it be not expreſly ſaid in the Deed that he may re-enter. If a Man make a Leaſe Y. by Indenture, provided always, and it is covenanted and agreed between the Parties, that the Leſſee ſhall not alien, this is both a Condition and Covenant.

The Word *Proviſo* ſometimes amounts to a Limitation or Qualification, and ſometimes to a Covenant.

Theſe Words in a Deed, *Quod ſi contingat* 204.
Redditum Prædictum a retro fore, give a Re-entry, if a Clauſe of Re-entry be added, not without it. But the other Words of themſelves make the Eſtate conditional, and yet it is uſual for the Satisfaction of the common People to add a Clauſe of Re-entry, as it is common to put a Clauſe of Diſtreſs into a Leaſe after the Reſervation of Rent; but *quæ Dubitationis Cauſâ tollendæ inſeruntur, non lædunt Communem Legem*; therefore, tho' the Diſtreſs be reſerv'd, if the Rent be unpaid a Week or a Month, yet the Leſſor may diſtrain the next Day after it is due, for the Words are Affirmative, and reſtrain not the Law.

If an Annuity of Rent be granted *pro unâ acrâ Terræ*, or *pro Decimis*, or *Conſilio*, and the firſt be loſt, or the laſt denied, the Annuity ceaſes, for it is executory, *and partly in Action, and can't be taken by the Grantee with-*

out Payment by the Grantor, and the Law will not compel the Grantor to pay it when the Conſideration for which it was granted ceaſes. But ſuch Words make not a State in Land conditional, for it is executed.

Yet if a Woman make a Feoffment to a Man upon account of an intended Marriage, which is called a Feoffment, *cauſa Matrimonii Prælocuti*; as if ſhe gives Land with ſuch Intent to a Man, *whom ſhe ingages herſelf to marry, and his Heirs, to aſſure him of her Faith and Conſtancy*, and ſhe afterwards marry him, or he refuſe to marry her, *or if ſhe give Land to another to re-inſeoff her and ſuch a one whom ſhe intends to marry, who afterwards refuſes to marry her*, ſhe may enter. But ſuch a Feoffment by a Man to a Woman is not conditional without apt Words of Condition; but in the former Caſe the Law favours the Modeſty of Women, which reſtrains 'em from asking Advice of Counſel in Caſes of this Nature.

F. N. B. 205. G.

One gives Land in Fee, *eâ Intentione*, that the Feoffee does ſuch an Act, or *ad Faciendum*, or *pro Faciendo*, or *ad Propoſitum*, yet ſuch Words make not an Eſtate conditional, except in the Caſe of the K. or of a Will. But a Leaſe Y. is [redacted] conditional by ſuch like Clauſes as theſe, *viz.* and he ſhall or ſhall not do ſo or ſo, on Pain of Forfeiture, *&c.*

Another Inſtance of ye particular Indulgence of the Law with reſpect to Wills

205. If *A.* make a Feoffment on Condition that on Payment of ſo much Money he ſhall re-enter, this is call'd a Feoffment in Mortgage.

If ſuch Feoffment be made, on Condition that if the Feoffor pay ſuch a Sum at a certain

tain Day, he ſhall re-enter, and the Feoffor die before the Day, yet if the Heir pay or tender the Sum at the Day, he may enter, tho' the Words be, if the Feoffor pay; for the Heir has an Intereſt in Right in the Condition, and all the Intent of the Parties was, that the Money ſhould be paid at the Day, and it is the ſame Benefit to the Feoffee to receive it from the one as from the other. So likewiſe the Executors or Adminiſtrators of the Mortgagor, or in their Default, the Ordinary may tender, and ſo may Guardian in Socage or Chivalry. And if the Heir be an Ideot, any one may do it for him out of Charity; but in other Caſes the Feoffee is not bound to accept a Tender by a Stranger; yet if he do, and the Heir or Mortgagor agree, they may re-enter, for *omnis Ratihabitio retro trahitur, & Mandato æquiparatur.*

If a Feoffment be, on a Condition that if the Feoffor or his Heirs pay 20*l.* before ſuch a Day, *&c.* and before the Day he die without Heir, the Eſtate of the Feoffee ſhall not be avoided; for when a Condition is poſſible at the Time of the Making the Eſtate, and after becomes impoſſible by the Act of God, the Eſtate of the Feoffee is unavoidable, for being executed and ſettled in him, it can't be defeated but by Matter ſubſequent, *viz.* the Performance of the Condition. But if the Condition of a Bond or Recognizance be poſſible when made, and afterwards become impoſſible by Act of God, the Bond or Recognizance is ſav'd, for they are executory, *and transfer no In-*

206.

tereſt, but only give a Right of Action to be brought in Futuro, upon the Default of the Obligor, before which there can no Advantage be taken thereof. If a Feoffment be made on Condition to do a Thing that is *Malum in ſe*, as to kill *J. S.* the Eſtate of the Feoffee is abſolute, and a Bond made on ſuch Condition, is void; *for the Eſtate ſettled in the Feoffee ſhall not be defeated, nor ſhall a Bond be forfeited for the Forbearance of ſuch an Action; and an* (a) *Obligee is puniſhable for taking ſuch a Bond to do a Thing againſt the Law.*

(a) 2 Ven. 309

But if the Condition of a Bond be impoſſible at the Time of the Making thereof, as for the Obligor to go to *Rome* the next Day, the Bond is ſingle, for it is the ſame as if there were no Condition at all; and a Feoffment, on Condition that the Feoffee go to *Rome* on a Day, is abſolute, for the Condition is repugnant to the Feoffment: But if an Eſtate be to ariſe, or a Duty to commence on a precedent Condition, that is impoſſible, they can never have Effect.

None ſhall take Advantage of a Condition that is himſelf the Cauſe of the other's not Performing it; as if one diſſeiſe and hold out by Force the Feoffee, that is by Condition bound to re infeoff him; or if the Obligee marry the Woman that the Obligor is bound to marry.

A Condition in a Feoffment, that the Feoffee ſhall not alien, is void, becauſe it is repugnant to the Eſtate: †But a Bond with Condition that the Feoffee ſhall not alien, or not take the Profits, is good.

If

If the Husband be bound to infeoff his Wife, the Condition is void, and the Bond good; but if he be bound to pay Money to the Wife, that is good.

In all Caſes of Condition for Payment of a certain Sum in Groſs, touching Lands, if a lawful Tender be once refuſed, he that ought to pay it is diſcharged for ever. But this is to be underſtood when a Feoffment is made with Condition of Payment of Money in Nature of a Gratuity; for if there were a Debt precedent for the ſecuring whereof the Feoffment was made, tho' the Feoffee refuſe to accept it, yet he may have an Action of Debt for it. 207. Co. L. 209.

A Tender may be made in Foreign Money current by Parliament or Proclamation; and it is ſufficient to tender it in Bags without ſhewing or telling it, for it is the Part of him that is to receive it to put it out and tell it. Co. L. 208. a.

If *A.* be bound in 100*l.* with Condition of Payment of 50*l.* at a Day to come, and he tender the 50*l.* at the Day, he ſaves the Penalty; yet if he plead the Tender and Refuſal, he muſt alſo plead that he is yet ready to pay the Money, and tender it in Court, for the Money tendred was Parcel of the Sum contain'd in the Obligation, *and the Tender ſhall be intended to be made to ſave the Penalty:* But if the Plaintiff take Iſſue on the Tender, and that be found againſt him, he loſes the Money for ever for his falſe Plea. And if the Condition of a Bond be to do a collateral Act, and the Obligee refuſe to accept a Tender thereof, the Obli-

gor is diſcharged for ever. And if *A.* be bound in 100 Quarters of Wheat for the Delivery of 50, and tender the 50 at the Day, he ſhall *(a)* not plead *Uncore Priſt*, for they are *bona Peritura*, and it will be a Charge to keep 'em. If Obligee or Conuſee make a Defeaſance of a ſingle Bond or Statute, on Condition of Payment of a leſſer Sum at a Day, and the Money be tendred at the Day, the Obligee or Conuſee have no Remedy either for the Sum in the Bond, or Defeaſance. *For the Force of the Bond is taken off as long as the Defeaſance continues in Force, which muſt be till there be a Default in him to whom it was made; nor can an Action be brought on the Defeaſance, which only frees the Party from an Action*, &c. *but does not of it ſelf give another.* If Obligor be bound to inſcoff the Obligee, and he make a Leaſe, and Releaſe to him and his Heirs, by this he ſufficiently performs the Condition.

(a) Contra Dy. 24. pl. 154.

† If a Feoffment be made on Condition, if the Feoffee pay on ſuch a Day ſo much Money, that then he ſhall have the Land to him and his Heirs; this Condition is void, for he had a Fee by the Words precedent, but if theſe Words be added, that if he do not pay, *&c.* that then the Feoffor may reenter, this makes the Eſtate conditional: And if the Feoffee before the Day make a Feoffment, either the firſt or ſecond Feoffee may pay it at the Day; the firſt, becauſe he is privy to the Condition; the ſecond, becauſe he has an Intereſt in the Condition for the Safe-guard of his Tenancy.

208. If a Feoffment be made on Condition that

that if the Feoffor pay ſuch a Sum he ſhall re-enter, without limiting a Day, the Law appoints the Payment to be at any Time during his Life, *for the Feoffee can be at no Prejudice by the Feoffor's being allowed ſo long a Time for Payment of the Money, becauſe he has the Land in the mean while in Satisfaction thereof.* Yet if he dies before he pays it, his Heir can't perform the Condition, becauſe the Time limited by Law is expired. If the Condition of a Bond be to do a tranſitory Act, (*i. e.* an Act which may be done in any Place,) or a local Act which may be done in the Abſence of the Obligee, it muſt be done preſently, *i. e.* in convenient Time, *for that is moſt for the Advantage of the Obligee, and a Deed is taken moſt ſtrongly againſt him that makes it*; but if the Concurrence of both be requiſite, the Obligor has Time during Life, unleſs he be haſtened by Requeſt.

If an Obligor or Feoffee be by Force of the Condition of a Bond or Feoffment to pay Money, or make a Feoffment to a Stranger, they muſt do it preſently, and muſt give Notice to the Stranger, and they ſhall not ſave the Condition by making a Tender thereof, if the other refuſe to accept of it, *for where one undertakes to do an Act to a Stranger, he muſt at his Peril take Care of the Performance of it.* But if a Mortgagor or his Heir, *&c.* tender the Redemption-Money to the Mortgagee on the Day, and he refuſe to accept it, the Mortgagor may re-enter. In like manner an Obligor bound to infeoff the Obligee, ſhall ſave the Bond by Tender and Refuſal. If the Feoffee be by Condition

n. If no time is limited the condition must be put immediately, unleſs the Obligee's concurrence is requiſite; then it must be at such Seasons as he knows of local Actions.

to make a Gift T. or grant a Rent Charge to a Stranger, and he make a Tender, and the other refuſe it, the Feoffor ſhall not re-enter, for it was intended that the Feoffee ſhould have ſomething in the Land, which by Re entry of the Feoffor he would loſe: But if he were to make a Feoffment to a Stranger, and he tender it to him, and the Stranger refuſe, the Feoffor may re-enter, for in ſuch Caſe he is merely deſigned as an Inſtrument to convey the Land to another.

If *A.* be bound to *B.* that *C.* ſhall inſeoff *D. C.* has Time during his Life to do it, unleſs he be haſtened by Requeſt, and if *C.* make a Tender thereof, and *D.* refuſe, the Bond is ſaved; for the Obligor undertakes not to do any Act himſelf, but his Intent is to engage for the Readineſs of a Stranger to do an Act to another, *who ſhall be intended to be a Friend of the Obligee, and under his Influence.* But in the ſaid Caſe, if the Condition were, that *C.* ſhould inſeoff *D.* on ſuch a Day, *C.* muſt ſeek *D.* and give him Notice thereof, and requeſt him to be on the Land at the Day.

Contra Perk. 756.

Co. L. 211. a.

Sometimes in reſpect of the Nature of the Thing to be done, the Obligor has not Time during his Life; as if the Condition of a Bond be to grant an Annuity to the Obligee, payable yearly at *Eaſter*, the Grant muſt be made before the next Feaſt of *Eaſter*.

Co. L. 208. b.

A Condition requiring the ſole Labour of the Feoffor or Obligor, or a Stranger, as to go to *Rome*, *&c.* may be done at any Time, nor can it be haſtened by Requeſt.

If

If the Feoffee in Mortgage die before the Day of Payment, the Money ſhall be paid to his Executors, not to his Heirs, unleſs they be nam'd; but if they be nam'd, the Payment can't be made to the Executors, for *Deſignatio unius eſt excluſio alterius.* If the Payment be to be made to Executors, and they agree before the Money is paid to repay Part, ſuch a Mock-Payment is no Performance of the Condition. If the Condition be, that the Feoffee ſhall pay to the Feoffor, his Heirs or Aſſigns, he may pay to the Executors of the Feoffor, for they are his Aſſigns in Law, *and he can make no Aſſigns in Deed of the Money or Condition*; but if the Condition be, that the Feoffor ſhall pay to the Feoffee, his Heirs or Aſſigns, it can't be paid to the Executors of the Feoffee, but his Aſſigns ſhall be taken in the natural Senſe of the Word for his Aſſigns of the Land; and where there may be Aſſigns in Deed, the Law will not make Aſſigns by Conſtruction, and in that Caſe it may be paid to the firſt Feoffee or the ſecond. 210.

A Mortgagor or Obligor muſt on the Day of Payment ſeek the Mortgagee or Obligee, and tender the Money, *&c.* if the Mortgagor, *&c.* be in the Realm of *England*; but if he be out of the Realm of *England*, the other is not bound to ſeek him there, but ſhall have the ſame Benefit as if he had made a Tender.

And the Ten't that holds by corporal Service to the Perſon of the Lord, ought to ſeek the Lord, *&c.* but a Man is not bound 211.

to tender Rent any where but on the Land.

If one be by the Condition of a Bond or Feoffment to pay ſuch a Sum at a certain Place or any Time during his Life, he ought to give Notice when he will pay it, and if he tender it according to ſuch Notice, or if at any Time he meet the Obligee or Feoffee at the Place and tender the Money, he ſaves the Penalty, *&c.*

If a Condition be broken by Non-payment of Rent, the Feoffor may either enter, or if he have had Seiſin of the Rent, he may bring his Aſſiſe, or he may diſtrain for it, (if it be ſuch Rent to which a Diſtreſs is annex'd,) but after he has brought an Aſſiſe or taken a Diſtreſs, he can't after enter for that Breach; ſo if he accept a Rent due at a Day after, for theſe Acts affirm the Leaſe to have had a Continuance after the Breach of the Condition. But he may receive and acquit the Rent, *the Non-payment whereof was a Breach of the Condition*, and then enter; *but this muſt be underſtood of a Rent reſerv'd on a Leaſe Y. which may be received as a Debt due on the Contract, but Rent reſerv'd on*
3 Rep. 64 b. *a Leaſe L. could be no otherwiſe due but as Rent, before the* 8 *Qu.* Anne, *and therefore a Receipt thereof diſpenſed with the Condition for the Time.*

212. It is moſt adviſeable to appoint the Money to be paid at a certain Time and Place, and then the Feoffor is not bound to ſeek the Feoffee in any other Place, nor to be there longer than is compriſed in the Indenture; nor is the Feoffee bound to receive it in

in any other Place: But if he receive it at another Place, or before the Day it is ſufficient.

If the Condition be to pay ſo much Money, and the Feoffor pay to the Feoffee a Horſe, or give him a Statute, or a Bond, or pay Part in Money, and be allowed for the reſt upon Account, in Conſideration of a Debt due to him from the Feoffee, or give any other Thing in Satisfaction of the Money, and the Feoffee receive it in full Satisfaction, this is a good Performance, tho' the Thing paid be not worth the 20th Part of the Money; *for the ſole Intent of the Condition is to enrich the Feoffee to the Value of ſo much as is expreſs'd therein, which whether it be done in Money, or what he eſteems worth the Money, is all one in Effect*, and leſs Money may be paid at another Day or Place in full Satisfaction of the whole, *for perhaps it may be more beneficial to the Feoffee than the Payment of the whole at the Day and Place appointed*; but a leſs Sum can't be paid in full Satisfaction of the whole at the ſame Day and Place, for it is apparent, that a leſſer Sum can't be a full Satisfaction of a greater; yet a Receipt of Part, and an Acquittance under Seal, in full Satisfaction of the whole, is ſufficient; becauſe the Party by his Deed acknowledges himſelf ſatisfy'd of the whole. But if the Condition be to give a Horſe, *&c.* or do any collateral Act, Money given in Satisfaction diſcharges it not; *for the Condition contain'd in the Deed can't be alter'd by parol Agreement, and the Payment of Money, and the giving of a Horſe*, &c. *can't be ſaid to be the*

for the Contract being made by writing & ſuch a Collateral Act cannot be altered without writing.

the ſame Thing in Subſtance. And if Money be to be paid to a Stranger, he can't accept of a collateral Thing in Satisfaction, *for it ſhall not be in the Power of a Stranger to defeat the Eſtate of another without a ſtrict Performance, according to the very Words*; but if Money be to be paid by a Stranger to the Feoffee, he may accept other Things in Satisfaction.

213. A Man makes a Feoffment on Condition that the Feoffee and his Heir ſhall pay a Rent to the Stranger and his Heirs, this is a good Condition; yet ſuch Payment is not properly Rent, becauſe it iſſues not out of Land, and an Aſſiſe lies not for it; and yet if it be not paid the Feoffor ſhall re-enter, and the Feoffee ought to ſeek the Stranger, for the Payment is but of a Sum in Groſs. *A.* ſeiſed of Land joins in a Feoffment with *B.* rendring Rent to them and their Heirs, and the Feoffee grants that it ſhall be lawful for 'em to diſtrain for the Rent, this is a good Grant to both, becauſe *B.* is a Party to the Deed.

And here *Note*, That Rent, which is properly Rent, can be reſerv'd to none but the Feoffor, Donor, or Leſſor, or to them and their Heirs, yet one may reſerve 20*s.* to himſelf for L. and a Pound of Cumin to his Heirs; but if he reſerve rent to himſelf or his Heirs, it is void as to his Heirs. If two Jointenants make a Leaſe by Deed Poll, or by Parol, reſerving Rent to one of them, it ſhall enure to both; but if the Leaſe were by Indenture, it would be good to him only to whom it was reſerv'd, becauſe

cauſe he was privy to the Leaſe. If two Jointenants, one for L. the other in Fee, join in a Leaſe L. or Gift T. rendring Rent, it ſhall enure to both. If Leſſor L. and his Leſſee join in a Leaſe L. or Gift T. rendring Rent, it ſhall go to Ten't L. only, during his Life, *becauſe the Poſſeſſion is wholly derived from the Eſtate of the Leſſee during his Life*; and at Law, if they had join'd by Deed in a Feoffment, the Feoffee ſhould have holden of the Ten't L. only whilſt he had lived,

Note; *Secondly*, That neither an Entry nor Re-entry can be reſerv'd or given to any Stranger. But the Heir may take Advantage of a Condition, whereof the Feoffor himſelf could not; as if the Condition be, that if the Heir pay 20 *s. &c.* that then he ſhall re-enter, for the Heir is privy in Blood, *this was diſinherited by the Feoffment, and is a particular Exception in Favour of the Heir out of the general Rule, for (a)* ſuch Reſervation of Rent *or other Hereditament* is void. 214. (a) Contra Hob. 130.

A Stranger being Grantee of a Rev'n may take Advantage of a Limitation, that *Ipſo Facto* determines the Eſtate without Entry; but *at Law* he had no Benefit of a Condition which determines not the Eſtate without Entry.

A Condition annexed to a State of Freehold, by ſuch Words as theſe, That if the Party do ſo or ſo, that then the Eſtate ſhall ceaſe and be void, defeats not the Freehold without Entry; but ſuch Words in a Leaſe Y. avoid it without Entry, and the Grantee of

of the Rev'n might always take Advantage thereof; but if the Words were, That the Leſſor might re-enter, the Grantee had no Benefit thereof before 32 *H.* 8.

Where the Eſtate is but voidable by the Condition, Acceptance of Rent after makes it good, but where it is void it doth not.

Succeſſors of Biſhop, *&c.* ſhall take Benefit of a Condition reſerv'd by him; Executors or Adminiſtrators of that reſerved by Leſſee Y. *ceſtuyque* Uſe, not his Feoffees, ſhou'd have taken Advantage of a Condition on a Feoffment made by him. Any Grantee of the Rev'n may have Benefit of a Condition in Law.

And by 32 *H.* 8. 34. every Grantee of a Rev'n may take Advantage of a Condition reſerv'd on a Leaſe, which Statute has been thus expounded.

1. That it extends to the Grantees of a common Perſon as well as of the K. and to the Grantees of the K.'s Succeſſors, tho' the King only be named: But not to Grantees of Rev'ns on Gifts T. for the Word in the Statute is *Leſſees.*

2. But it extends to Aſſigns of Part of the State of the Rev'n, as when the Rev'n on a Leaſe L. is granted for L. or a Rev'n on a Leaſe Y. is granted for Y. becauſe the Act ſpeaks of Executors of the Grantees; but not to Aſſignees of the Rev'n of Part of the Land; in which Caſe the Condition being entire, and againſt common Right, is deſtroyed; except the K.'s Caſe, in whom the Condition ſtill remains, [*tho' he have granted Part of the Rev'n, for ſo much as remains in him,*

5 Rep. 54, 55.

but

but the Grantee ſhall not take Advantage of it:] And in the Caſe of a Subject, the Condition may be apportioned by Act of Law; as when Part of the Rev'n goes to the Heir at Law, and the other to the Heir by Cuſtom of Borough *Engliſh.*

3. A Power of Revocation may be extinct as to Part, and remain for the reſt; for it is in Nature of a Limitation, not of a Condition.

4. When Attornment was neceſſary, the Grantee could not take Benefit of the Condition without it.

5. The Statute extends to Bargainee, or any other that comes in by Execution of the Uſe to the Poſſeſſion, tho' they be not in the *per* by the Bargainor, *&c.* for the Act ſays, Aſſignees to and by; but it extends not to Lord by Eſcheat, or claiming by Reaſon of Mortmain.

6. Bargainee, *&c.* can't take Benefit of a Condition without giving Notice to the Leſſee.

7. The Condition muſt be for doing ſomething incident to the Rev'n, or for the Benefit of the Eſtate; as for Payment of Rent, Repairs, *&c.* not for doing any Thing in Groſs, for the Act puts Examples of the firſt Sort only.

And by the ſaid Statute, all Covenants and Agreements concerning the Land are tranſferr'd to the Grantee.

If the Rev'n eſcheat, the Lord ſhall diſtrain for the Rent reſerv'd, but ſhall not enter for a Condition broken; but Guardian in Socage or Chivalry may.

216. If Land be granted for two Years on Condition that if the Grantee pay 20 *s.* in the two Years, that then he ſhall have Fee, yet he ſhall not have Fee by paying of it; for tho' a Condition encreaſing an Eſtate may be by Parol, yet no Freehold can paſs without Livery. But if an Eſtate be granted for five Years, and if the Grantee pay 40 *s.* within the firſt two Years, that then he ſhall have Fee, or otherwiſe but for five Years, and Livery be made, now has the Grantee a Fee conditional by Conſtruction of Law, and
217. yet the Words ſeem to make the Condition precedent; but inaſmuch as the Livery can't expect, but muſt give a preſent Freehold or none, (for which Cauſe a Leaſe Y. Rem'r to *J. S.*'s Heirs is void,) this ſhall be conſtrued a Condition ſubſequent; for the Law will often tranſpoſe Words, that a Feoffment or Grant may take effect; as if at *Chriſtmas* an Annuity be granted, or a Rent reſerv'd on a Leaſe, payable yearly at *Michaelmas* and *Lady-day*; yet the firſt Payment ſhall be at *Lady-day*, for otherwiſe it would not be paid yearly. But if a Thing that lies in Grant be granted for Y. with ſuch Condition, the Fee ſhall not paſs till it be performed. And the K. by Letters Patents may grant Land for Y. with Condition to have Fee, and it ſhall be a precedent one. As to the Authorities that ſeem to contradict *Littleton*, they ought to be underſtood thus, That a Leaſe Y. was firſt made, and afterwards an executory Grant to inlarge the Eſtate on Condition, and in ſuch Caſe the Freehold paſſes not till the Condition is performed.

A Leaſe

A Leaſe L. is made to a Man and Woman on Condition that whichſoever of 'em ſhall firſt marry ſhall have Fee, and they intermarry, neither of 'em ſhall have it for the Incertainty. A Leaſe L. is made with Condition to encreaſe the Eſtate on Payment to the Leſſor at a Day, and before the Day he is executed for Treaſon, the Eſtate ſhall not encreaſe, tho' the Condition became impoſſible by the Act of the Leſſor. 218.

He that will take Advantage of a Condition, muſt enter if he can; if he can't, he muſt claim: For a Freehold, whether it lie in Grant or Livery, can't ceaſe by Condition without Entry or Claim, tho' the Words are, *Proviſo*, that if he don't pay, *&c.* that then the Eſtate ſhall ceaſe and be void; whether the Conveyance were by Feoffment, Bargain, and Sale, or Deviſe, *&c.*

But in the Caſe above, where a Grant was made for five Years on Condition to have Fee on Payment of 20 *s.* in the firſt two Years; inasmuch as the Fee paſs'd from the Leſſor, by Conſtruction of Law, it ſhall be reveſted by Non performance of the Condition, by like Conſtruction, without Entry or Claim. So if the Feoffee on Condition collateral, *i. e. not conſiſting in Payment of Rent*, leaſe to the Feoffor, rendring Rent, and the Condition be not performed, the Feoffor ſhall retain the Land, and the Rent is extinct; and the Condition being collateral, was not ſuſpended by the Feoffor's taking the Leaſe, as it would have been if it had conſiſted in Payment of Rent. So if a Man grant a Rent out of his Land on Condition, and it be broken,

or

or covenant to ſtand ſeis'd with Power of Revocation, and revoke; in all theſe Caſes no Entry or Claim is required, becauſe he that is to take Benefit of the Condition is already in Poſſeſſion of the Land.

An Eſtate may be ſurrendred on Condition: But if Leſſee for 40 Years take a new Leaſe for 20, on Condition, *&c.* or a Grant of the Rev'n on Condition, and afterwards the Condition be broken, his Leaſe for 40 Years ſhall not revive; for it was abſolutely extinct by the Surrender, and the Condition was not annexed to the Surrender, but to the 2d Eſtate only. If a Guardian in Chivalry be infeoff'd by the Infant, this makes him a Diſs'or, and abſolutely ſurrenders his Eſtate, and yet the Feoffment is void as againſt the Infant.

A. makes a Leaſe L. reſerving a Roſe the firſt 7 Years: and if he will hold over, then reſerving a Rent in Money, Leſſee will not hold over, but ſurrenders, in this Caſe, in Judgment of Law, he had but a Leaſe for 7 Years *ab initio.* So if one make a Leaſe L. and if Leſſee in one Year pay not 20*s.* that then he ſhall have it but for two Years; his Freehold determines by Non payment, and he has it but for two Years.

Vide Bro. Covin 16.

219. *A.* makes a Feoffment, on Condition that the Feoffee ſhall give the Land to the Feoffor and his Wife, in Special T. Rem'r to the Heirs of the Feoffor, and the Feoffor dies before ſuch Gift is made, the Feoffee ought to make it as near the Intent of the Condition as may be, *viz.* to let the Land to the Wife without Impeachment of Waſte, Rem'r to the

he Heirs of the Body of her Husband of er Body bogotten, Rem'r to the Husband's ight Heirs. And if ſhe accept a State for .. tho' it have not the Clauſe of being vithout Impeachment of Waſte, or if ſhe narry, and a State be made to her and her Husband for her Life, yet is the Condition well performed, for ſhe receives the Eſtate leſign'd in Subſtance; *and the Omiſſion of the Privilege of being without Impeachment of Waſte ſhall not give the Heir of the Feoffor, for whoſe Benefit it was omitted, a Re-entry,* (*a*) *which would defeat the Eſtate of the Wife.* 220.

(*a*) 2 Rep. 82. a.

(*Note*; This Clauſe, without Impeachment of Waſte, gives the Leſſee Power to cut down Trees, and convert 'em to his own Uſe; but the Clauſe *ſans Impeachment per aſcun Action de Waſte* does not.)

If the Feoffor and his Wife both die, the Feoffee ought to make the Eſtate to the Iſſue, and the Heirs of the Body of his Father and Mother begotten, Rem'r to the right Heirs of the Husband. And if divers make a Feoffment, on Condition that the Feoffee ſhall re-infeoff 'em, and they all die before the Re-infeoffment, then ought the Feoffor to infeoff the Heir of the Survivor, to have and to hold to him and the Heirs of the Survivor; and in this Caſe the Heirs of the Father ſhall only inherit: But if the Limitation were to the Heirs of the Heir, then ſhou'd the Heirs of his Mother's Side inherit, which would be contrary to the Intent of the Condition. 220. *b.* Vide ſupra 15.

If the Condition of a Feoffment be, that the Feoffee make a Gift in Frankmarriage to one

one not of his Kindred, or an Eſtate in Frankalmoine to a Layman; he muſt make a State L. in both Caſes: *Which is the ſame Eſtate which would have paſs'd if the Feoffee had uſed the very Words expreſs'd in the Condition, nor does it appear to be the Feoffor's Intent that the Feoffee ſhould convey an Inheritance.*

Tho' a Condition that ſaves an Eſtate be conſtrued favourably, and that which deſtroys the Eſtate ſtrictly, yet if the Condition be, that the Mortgagor and *J. S.* pay 10*l.* at ſuch a Day, and before the Day the
219. *b.* Mortgagor die, it is ſufficient if *J. S.* pay it; yet if both be alive at the Day, the Mortgagee is not bound to accept of it from one only. But if a Leaſe for 20 Years be made to two, provided that if the Leſſees die within the Term the Leſſor ſhall reenter; if one alien and die, he ſhall not enter till both are dead, for that is the manifeſt Intent of the *Proviſo*. But in the firſt Caſe the Subſtance of the Condition is that ſo much Money be paid to the Mortgagee, and when the Act of God makes it impoſſible to be paid by both the Parties named, if it be paid by the other, it is ſufficient, for it is in Effect the ſame Thing.

220. *a.* When the Condition of a Feoffment is to re-inſeoff, or make a Gift T. to the Feoffor, or to him and a Stranger, the Feoffee has Time during Life to perform it, unleſs haſtened by Requeſt; but if he refuſe when reaſonably required by thoſe that ought to have ſuch Eſtate, the Feoffor

or

or his Heirs may re-enter. But if it be to make a Feoffment or Gift to a Stranger, he muſt do it in convenient Time.

If the Condition be that the Feoffee before ſuch a Day ſhall re-infeoff the Feoffor, and before the Day the Feoffee die, his Eſtate is abſolute; becauſe when the Condition becomes impoſſible, by the Act of God, within the Time limited by the mutual Agreement of the Parties, the Feoffee is diſcharged. *Sed Q. of this Caſe; for by the expreſs Intent of the Feoffment, the Feoffee is to be but an Inſtrument to re-convey the Land to the Feoffor,* &c. *and why ſhould he not take Care that it be performed before he dies?* And in my Lord *Clifford*'s Caſe, who having Licence to infeoff divers of *Capite* Lands on Condition that they made to him a Gift T. did infeoff 'em according to the ſaid Licence, it was adjudged that the Feoffees were bound to make the Gift in his Life, for the Licence did not extend to the Iſſue; and if the Feoffees ſhould make a Gift to the Iſſue, K. might ſeiſe the Land for Default of a Licence, and the Land would not be in the ſame Plight as it was at the Feoffment: So if an Advowſon be granted on Condition to re-grant it to the Grantor, the Grantee muſt make the Re-grant before the next Avoidance, or otherwiſe the Grantor would loſe the next Avoidance: *And why ſhould not the manifeſt Intent of the Parties alſo in the Caſe above, where a certain Time is limited, make it neceſſary for the Feoffee to re-convey before his own Death; for otherwiſe,*

219. a.

222. a. b.

therwiſe the neglecting to perform the Condition, which was the ſole Inducement of the Feoffment, would give him an abſolute Fee if he happen to die before the Time; whereas by performing it, he ſhould have nothing.

221. When the Condition is, That the Feoffee ſhall re-infeoff, or make a Gift in Tail, *&c.* to the Feoffor, and the Feoffee before he performs it makes a Feoffment or Gift in T. or Leaſe L. or Y. *in præſenti*, or *futuro*, to another Perſon, or marry, or grant a Rent-Charge, or be bound in a Statute or Recognizance, or become profeſs'd; in all theſe Caſes the Condition is broken, for the Feoffee has either diſabled himſelf to make any Eſtate, or to make it in the ſame Plight or Freedom in which he received it; and being once diſabled, he is ever diſabled, tho' his Wife ſhould die, or the Rent, *&c.* ſhould be diſcharg'd, or he ſhould be deraign'd, *&c.* before the Time of the Reconveyance.

222. But if the Feoffee be diſſeis'd, and during the Diſs'in marry, or be bound in a Recognizance, and the Wife die, or the Recognizance be releaſed before he reenters, the Condition is not broken, becauſe the Land was never charged.

But tho' the Feoffor be diſabled to perform the Condition by Attainder or ſuch like, before the Day; yet if at the Day the Diſability is removed, and the Condition performed, it is ſufficient, *for the Feoffee can be at no Prejudice thereby; but in the former Caſe the Feoffee, by incumbring the Land contrary to the Intent of the Con-*

dition, gives the Feoffor a Right of Re-entry, which shall not be lost, tho' such Incumbrances be afterwards discharged.

a Right of Entry once reserved, shall not be lost but by act of the Party.

If a Deed of Feoffment be made without any Condition, and Livery by Force of it be made on Condition, nothing passes by the Deed, because the Condition is not comprised in it, and it is of the same Force as if no Deed had been made. *Before* 29 Car. 2. 3. If it were agreed between two, to make a Feoffment on Condition for Surety of Payment of certain Money, and the Livery had been made generally to the Feoffee and his Heirs, it was said, that the Estate should be conditional, because the Intent of the Parties continued at the Time of the Livery, which should be intended to be made in Pursuance thereof. 223. Vid. supra 80.

A Condition annex'd to a Feoffment or Grant in Fee, (tho' it be of a new Rent,) or to the Sale of one's whole Interest in a Chattel, that the Feoffee or Grantee shall not alien, is repugnant and void; for *iniquum est liberis hominibus non esse liberam rerum suarum alienationem:* It is also against the Benefit of Trade, and would in a great Measure restrain Bargaining and Contracting between Man and Man. But he that has a Rev'n may restrain his Donee, or Lessee from aliening; and before the Statute of *Quia emptores terrarum*, a Man might have made a Feoffment, and have added, that if the Feoffee, or his Heirs should alien without Licence, that they should pay a Fine: And some say, that he might have restrain'd the Alienation by Condi- 223 a.

Condition, (as K. may ſtill do,) becauſe he might have reſerv'd a Tenure to himſelf. Feoffment of *B.* Acre, on Condition that the Feoffee ſhall not alien *W.* Acre, is good; for it is not repugnant to the Feoffment of *B.* Acre, becauſe that may be aliened without Forfeiture. If it be the Condition of a Feoffment, that the Feoffee ſhall not infeoff *J.S.* and the Feoffee infeoff *J.N.* on Purpoſe that he ſhall infeoff *J.S.* 'tis ſaid this is a Breach; for *quando aliquid prohibetur fieri ex directo, prohibetur & per obliquum.* Whatever is prohibited by Statute or Common Law, as Alienations in Mortmain, &c. may be prohibited by Condition.

224. A Condition annex'd to a Gift in T. that neither the Donee, nor his Heir, ſhall diſcontinue, is good; ſo is a Condition in a Feoffment made to a Biſhop, that neither he nor his Succeſſor ſhall alien without Conſent of the Chapter, for the Acts reſtrain'd by ſuch Conditions are tortious. A Condition not to alien in a Feoffment made to a Husband and Wife ſhall reſtrain their Alienation by Deed, but not by Fine; for that would be repugnant and void: It is ſaid that ſuch a Condition in a Feoffment to an Infant ſhall reſtrain his Alienation during his Nonage.

Where ye Fee simple does not passe &c. where ye donor or Lessor have not divested themselves of all possibility of reverter & ye Land again such Conditions to restrain Alienations are in respect of ye reversion.

A Leſſor, in Reſpect of his Rev'n, may by Condition reſtrain his Leſſee from alienating; and Donor may by Condition reſtrain the Power which Ten't T. has by Statute to make Leaſes for 3 L. or 21 Y. for *quilibet poteſt renunciare iuri pro ſe introducto.*

But an Eſtate T. has five eſſential Incidents, none of which can be taken away by any Condition. 1. To be diſpuniſhable of Waſte. 2. That the Wife ſhall be endowed. 3. That the Husband ſhall be Ten't by Curteſy. 4. That Ten't T. may ſuffer a Common Recovery. 5. That collateral Warranty, (*whether with or without Aſſets, if made before* 4 & 5 Annæ 16.) or lineal with Aſſets, may bar it.

If a Gift in T. with a Rem'r in Fee, be made to the ſame Perſon, with Condition not to alien, this is good as to the Entail, but void as to the Fee; therefore if ſuch Donee make a Feoffment, and Donor re-enter, ſome ſay that he ſhall leave the Fee-ſimple in the Feoffee.

It is holden, that the Donor may make a Condition that the Donee may alien for the Profit of his Iſſues.

If Lands be given in T. on Condition, that if the Donee die without Heir of his Body, that the Donor may re-enter, this is a void Condition, for when the Iſſues fail, the Eſtate determines by expreſs Limitation; but if the Condition be, that if the Donee diſcontinue, and die without Iſſue, that the Donor ſhall re-enter, this is good; 225.
and being in the Copulative, both Parts muſt be performed before Donor can re-enter; but if the Condition be in the Diſjunctive, it is ſufficient to perform one Part. A Leaſe for 20 Years is made to Husband and Wife, if he and his Wife, or any Child between 'em, ſhall ſo long live; the Wife dies without Iſſue, the Leaſe ſhall not determine;

termine; for the Senſe is, if Husband, or Wife or any Child, *&c.* So if an Uſe be limited till *A.* ſhall come from beyond Sea, and attain his full Age, or die, the Uſe ſhall ceaſe if he come from beyond Sea, or attain his full Age, or die.

A Man can't plead a Condition to defeat a Freehold without ſhewing a Record, or Deed to prove it; but a Condition to defeat the Grant of a Chattel, he may.

He that pleads a Deed, ought to ſhew it to the Court, that the Court may judge whether it have legal Words: And of antient Time the Court, on View, judg'd it void if raz'd or interlin'd in Places material; but now it is left to be tried by the Jury, whether it were done before Delivery. The Deed it ſelf muſt be ſhewn; nor can any Inrollment thereof, or Exemplification under the Great Seal be pleaded; but by Statute a *conſtat*, or *inſpeximus* of Letters Patents made ſince the 27 *H.* 8. may be pleaded by K.'s Patentees, or any claiming under 'em, as well againſt K. as any other. A *conſtat*, *&c.* can only be of the Inrollment of Record; but not of a Deed or any other Writing, that's not of Record. Nor can a Deed be inrolled till duly acknowledged.

3 Ed. 6. 4. 13 El. 6.

226. Thoſe that come in by Act of Law, as Ten't in Dower, Statute Merchant, *&c.* may plead a Condition without ſhewing the Deed; but Ten't by Curteſy cannot, for the Law preſumes that he had the Poſſeſſion of his Wife's Deeds, * *and he may keep 'em during his Life:* Nor ſhall the Lord by Eſcheat,

* 10 Rep. 94. b. 95. a.

Eſcheat, becauſe the Deed belongs to him, nor any that claim by Conveyance from the Party, or juſtify as Servants by his Command, *&c.* plead a Condition without ſhewing the Deed.

Ten't T. makes a Feoffment on Condition; re-enters and dies; his Iſſue being remitted, needs not in Pleading this Special Matter ſhew the Deed, *for he by the Remitter claims above the Condition.*

Ten't to a *Præcipe* pleads in Abatement of the Writ, *(for Non-tenure,)* That *J. S.* infeoffed him on Condition and re-enter'd, and was not compelled to ſhew the Deed, becauſe the Demandant was a Stranger, *nor did the Ten't make himſelf a Title againſt him by Force of it*; and it may be that on the Re-entry the Deed might be given up to the Feoffor. The Leſſee of a Mortgagee evicted by the Mortgagor, may in an Action of Debt for the Rent by Mortgagee, ſhew the Condition and Re-entry without Deed, for he is no Way privy to it: And if the Feoffee, after a Re-entry by the Feoffor, for Condition broken, enter and take away the Deed and detain it, the Feoffor, in an Aſſiſe brought againſt him, ſhall not be enforced to ſhew the Deed, *for the Feoffee ſhall take no Benefit of his own Wrong.* A Woman may in Pleading aver a Feoffment to be *Cauſâ Matrimonii prælocuti*, albeit ſhe have not any Writing to prove it.

Vide ſupra 289.

If a Condition on a Parol Leaſe L. (*made before* 29 Car. 2. 3.) be broken, and the Leſſor re-enter, and the Leſſee bring an Aſſiſe,

and the Leſſor plead *null tort*, &c. and the Jury find the Leaſe and Condition, and Re-entry in a ſpecial Verdict, the Court ought to give Judgment, that the Plaintiff ſhall take nothing by his Aſſiſe. But if after the Entry of the Leſſor for the Condition broken, the Leſſee re-enter, and the Leſſor bring an Aſſiſe, and the Leſſee plead in Bar the Leaſe L. made by the Plaintiff, ſaving the Rev'n to him, this is a good Bar; becauſe he owns the Rev'n to be in the Plaintiff, and the Leſſor has no Remedy, for he can't plead the Condition without ſhewing a Deed and the Leaſe was without any. One can't plead a Leaſe Y. in Bar of an Aſſiſe as to ſay *Aſſiſa non*; but he may juſtify by Force of the Leaſe, and conclude, *& iſſint ſans tort*; and if no Freeholder be named, he ſhall plead *Null Ten't del Franktenement noſme en le Brief.* One may plead a Feoffment with Warranty in Aſſiſe, but he muſt rely on the Warranty, *for otherwiſe, if it be a Feoffment of the Party himſelf on an Anceſtor from whom he claims in Fee, the Plea would be double.*

The Party in all these Cases may be reliev'd by a Special Verdict

Co. L. 228.

A Special Verdict may be given on any Special Iſſue, as well as on a General Iſſue; and in Criminal Cauſes as well as Civil.

227. No Judgment can be given on an incertain Verdict; as if in an Action againſt Executors, the Jury find upon the Iſſue of *Pleinment adminiſtre*, that they have Goods in their Hands not adminiſter'd, but do not aſcertain the Value. And if they do not try the whole wherewith they are charged,

charged; as if an Information be brought concerning 100 Acres and a Houſe, and they find the Defendant guilty as to the Acres, but ſay nothing to the Houſe, this is inſufficient as to the whole: But if they find the whole and more, that which is more is Surplus, and ſhall not ſtay Judgment. And if the Matter and Subſtance of the Iſſue is found, it is ſufficient.

The Jury may find Eſtoppels which bind the Intereſt of the Land; as the taking a Leaſe of one's own Land by Indenture, and the Court ought to adjudge according to the Special Matter, *(a) as much as if it had been pleaded*; and they may find a collateral Warranty tho' it were not pleaded, becauſe it binds the Right; but they can't find it in a Writ of Right where the *Miſe* is join'd on the mere Right.

(a) Cro. El. 140. 4 Rep. 53.

The Jury can't vary from a Verdict recorded, but before it is recorded they may vary from it. A Verdict ſhall be intended to be true till it be reverſed by Attaint; therefore no *Superſedeas of the Execution of a Judgment* is grantable on *bringing an* Attaint *to reverſe it.* It is fineable for the Jury to eat at their own Charge after they are departed from the Bar, But it ſhall not avoid the Verdict: To eat at the Charge of one of the Parties before they are agreed, ſhall avoid the Verdict if it paſs for him; but to eat at his Charge after they are agreed, *and have given a privy Verdict*, ſhall not avoid it. If either Party, or any for him, deliver a Letter, or any Evidence touching the Matter in Iſſue,

1 Vent. 125.

which was not produced in Court, it ſhall avoid the Verdict, if given for the ſame Party. But if the Jury carry away a Writing not ſealed up that was given in Evidence, this avoids not the Verdict, tho' it ought not to have been done.

After their Departure from the Bar, they are to be kept in ſome convenient Place without Meat, Drink, Fire, Candle, or Speech with any but the Bailiff. In Civil Cauſes they may give a privy Verdict before any Judge of the Court, and then they may eat and drink; but they may vary from it, and the Verdict which they give in open Court ſhall ſtand: But in Criminal Cauſes of Life or Member, no privy Verdict can be given. And in ſuch Cauſes the Jury ſworn and charged, can't be (*a*) diſcharged till they have given a Verdict. (*b*) *If they can't agree in ſuch Cauſes, they muſt be carried after the Judge in Carts till they agree.*

(*a*) Kel. 52. contra.
(*b*) 1 Vent. 97.

If a Deed be made and dated out of *England* of Land lying here, yet if Livery be made *ſecundum formam cartæ*, the Land ſhall paſs.

228. The Jury may in any Caſe, if they will take upon 'em the Knowledge of the Law, give a General Verdict; but if they miſtake the Law, an Attaint lies againſt them.

229. An Indenture is a Deed in Parchment or Paper indented on one Side or the Top, anſwerable to another, comprehending the ſame Matter: If it be actually indented, it is not neceſſary that it be ſaid to be an Indenture; and if it be called an Indenture,

and

and not actually indented, it is no Indenture. All the Parts of it are but one Deed in Law, therefore after the Eſtate determin'd, the Part of the Donee belongs to the Donor: If the Feoffor ſeal his Part, it is his Deed, tho' the Feoffee ſeal no Counterpart; and when the Feoffee has ſeal'd his Part, it is the Deed of both.

Some Indentures are in the 3d Perſon, in this Form, *Hæc Indentura facta inter* A. *de* B. *ex unâ Parte, &c.* The Statute which ſays that Bonds in the 3d Perſon are void, muſt be underſtood of thoſe taken in other Courts out of the Realm.

Indentures in the firſt Perſon begin thus, *Omnibus in Chriſto fidelibus ad quos, &c.* and 230.
tho' the Words of ſuch Indentures are only the Words of the Feoffor, yet when the Feoffee has put his Seal, it is the Deed of both; but Mention muſt be made in the Deed that the Feoffee has ſealed, for he is no Way privy to it, being in the firſt Perſon, but by the Clauſe of putting his Seal to it.

A Leaſe is made for L. Rem'r in Fee on 231.
certain Conditions, and Leſſee ſeals it and dies; he in Rem'r is bound to perform the Conditions, tho' he ſealed no Part of the Indenture, inaſmuch as he agrees to have the Land by Force of the Leaſe in which the Conditions are contain'd; but by Special Limitation the Conditions may extend to the Leaſe only.

A Leaſe Y. is made to *A.* and *B.* and therein they grant to be bound to the Leſſor in 20 *l.* in caſe that certain Conditions in the Indenture were not perform'd; in an Action

of Debt for this, tho' it be a Sum in Groſs, both the Leſſees muſt be named, albeit the Deed were delivered to *A.* in *B.*'s Abſence.

because they are Joint-Tenants of the Term by this Indenture.

A Feoffment is made by Deed Poll on Condition, the Feoffor enters for a Breach, and gets Poſſeſſion of the Deed Poll: Some have ſaid that he can't plead it, becauſe the Property thereof is in the Feoffee. But the Law is otherwiie for theſe Reaſons.

1. If in an Action between 'em the Feoffee had ſhewn the Deed in Court, the Feoffor might have pleaded that it was made on Condition, *&c.* and by the ſame Reaſon, when he has it in Hand, he may plead it, eſpecially ſeeing that he is privy to it.

Any Man who is privy to a Deed may plead it tho' he can't ſhow it, but a Stranger may plead it without it. Vid. Supra. The Caſe of the Mortgagee's Leſſee.

(*Note*, That when a Deed is ſhewn in Court, it remains there all the Term; and if not denied, is delivered to the Party at the End of the Term; if it be denied, it remains in Court till the Plea is determined.)

232. 2. If two do a Treſpaſs, one may plead a Releaſe to the other; ſo may Executors a Releaſe to the Heir, ſo may a Joint Obligor a Releaſe to the other, tho' the Property of the Deed belong not to him that pleads it; but inaſmuch as they are Privies, they can't plead the Deed without ſhewing it. An Action of Treſpaſs may be joint or ſeveral at the Will of the Plaintiff, but an Appeal of Death muſt be ſued againſt all the Defendants.

3. The Feoffee may grant the Deed to the Feoffor, and then the Property belongs to him; and when a Deed is ſhewn by the Feoffor, the Law rather intends that he came by it by lawful than wrongful Means. Tho' a Thing in Action can't be granted, yet the Deed may

may, *viz.* the Wax and Parchment, and the Grantee may cancel 'em at Pleaſure.; *Thus for 4 Cond. tions in Deed*

Sometimes the Law annexes a Condition to an Eſtate, which is as ſtrong as if it were expreſſed in a Deed; as when one grants the Parkerſhip of a Park for L. if the Grantee do not well keep the Park, or kill any Deer without Warrant, or cut down Trees, or Underwoods, and convert them to his own Uſe, *&c.* the Grantor may ouſt him, and grant it to any other. But without ſpecial Damage Non-attendance of it ſelf is no Forfeiture of ſuch a private Office, as it is of a publick one. 233.

A Park is a great Incloſure privileg'd for wild Beaſts of Chaſe by Preſcription or K.'s Grant. Every Foreſt is a Chaſe, *non è converſo*, but neither Foreſts nor Chaſes are inclos'd.

An Officer for Life, *&c.* that has only a collateral Fee, may be diſcharged of his Service, but he ſhall have his Fee; but where his Fee is to be taken out of the Profits belonging to his Lord within his Office, he can't be diſcharged.

Where the Condition in Law requires Skill and Confidence, as in caſe of Offices, *&c.* an Infant, or *Feme* Covert not obſerving it, whether they come to the Eſtate by Grant or Deſcent, abſolutely forfeit their Intereſt: *For ſuch Grants were originally made in Conſideration of the Capacity and Integrity of the Grantee, who when he becomes unqualified, the Grantor may chuſe another fit for ſuch Service.* But if an Infant or *Feme* Covert break a Condition in

Law, that requires no Skill or Confidence, as when being particular Ten'ts, they make a greater Eſtate than they lawfully can, this is no abſolute Forfeiture. Yet a Condition in Deed binds 'em *as much as if they were of full Age or unmarried, for the Law will not to the Prejudice of the Feoffor, and againſt his expreſs Reſervation, make their Eſtate better than they receiv'd it.* But in Waſte, a Recovery had againſt 'em, binds 'em for ever. *For 'tis againſt the publick Good, and an irreparable Damage to the Inheritance. But in* (a) Co. Lit. 381. a. *(a)* ceſſavit *againſt an Infant claiming by Deſcent, he ſhall have his Age*; and generally where a Statute gives an Entry, as for an Alienation in Mortmain, *&c.* Infants or *Feme* Coverts, ſhall not be abſolutely barr'd.

Regularly, he that enters or recovers by Force of an implied Condition, whether by Law or Statute ſhall not avoid precedent Incumbrances, except when Leſſee for Life makes a Leaſe Y. and then enters and commits Waſte; in which Caſe the firſt Leſſor recovering in Waſte, ſhall avoid the Leaſe Y. for the Statute ſays, he ſhall recover *Locum Vaſtatum.* It is ſaid, if an Officer for 234. Life have an Houſe that belongs to his Office, and grant a Rent, and forfeit, that the Grant remains good for his Life, *ſed Q. For the Grantor of the Office is in no Default, and yet by the Act of his Grantee, would loſe the Benefit of having the Office ſupply'd by ſo worthy a Man as might be induced to accept of it with its uſual Appurtenances.*

By

By Statute, if an Officer concerning the Adminiſtration of Juſtice, or K.'s Treaſure, Caſtles, *&c.* ſell, or take Promiſe for the ſaid Offices or any Deputation, he ſhall forfeit his Office, and the Contract ſhall be void, and the Buyer or Promiſer, *&c.* diſabled to hold the ſaid Office; and this can't be diſpens'd with by any *Non Obſtante*, as it was reſolved in Sir *Ro. Vernon*'s Caſe, who being K.'s Cofferer, for Money ſurrendred to the K. to the Intent that the K. might grant it to *A.* yet *A.* could not hold it. 5 El. 6. 16. 7 E. 6. 1. Vid ſupra 178.

Grants of Offices of Steward, Bailiff, *&c.* are ſubject to this Condition in Law, that the Grantee ſhall duly execute 'em, and they can't exerciſe them by Deputy, unleſs they were granted to be occupied by the Grantee or his Deputy.

Littleton calls Limitations Conditions in Law; as when Land is given to Husband and Wife during the Coverture; and ſuch a State ceaſes by Death, or *Divorce a Vinculo*, which can only be *Cauſa Metus*, *Frigiditatis*, *Conſanguinitatis*, or *Affinitatis*. By 32 *H.* 8. 38. all Marriages are lawful which are not prohibited by the Levitical Degrees; therefore, where a Man was queſtion'd in the Spiritual Court for marrying his late Wife's Siſter's Daughter, a (*a*) Prohibition was granted. But a Divorce a *Menſâ & Thoro*, which is allow'd for Adultery, ſhall not diſſolve the Marriage *a Vinculo Matrimonii*, for it is ſubſequent to the Marriage, but in the other Caſes the Marriage was unlawful *ab initio*. 235. (*a*) Quære 2 Lev. 254. 3 Lev. 364.

Proper

Proper Words of Limitation are, *Dum, dummodo, quamdiu, donec, quouſque, ubicunque, uſque ad, tamdiu*, or ſo long as he ſhall live ſole, or chaſte, or pay ſuch a Rent, or be Abbot, or Parſon, *&c.*

236. Where one deviſes Land to his Executors to be ſold, or his Land to be ſold by his Executors, which is all one, if they ſell not in convenient Time, the Heir may enter, and it is no Plea that the Money offered to em for the Purchaſe was not to the Value of the Land; but when one deviſes that his Executors ſhall ſell the Land, they may do it at any Time, for in this Caſe they ſhall not take the Profits, but in the firſt Caſe they ſhall take the Profits, yet they ſhall not be Aſſets. *Quære.*

Vide ſupra 170. Deviſe of Land *ad Solvendum*, or *Vendendum*, or paying ſo much to *J. N.* amounts to a Condition; and where one has two Daughters, and deviſes Land to one of 'em, paying 10*l.* to the other, the Siſter for Non-payment may enter into a Moiety.

Eſtates of Inheritance executed *and ſettled in Poſſeſſion* by Livery, or Releaſe of Diſs'ee to Diſs'or, can't be defeated by Defeaſance made after, but by Defeaſance made at the Time of the Feoffment or Releaſe they may, for *quæ incontinenti fiunt in eſſe videntur*, but Rents, Conditions, Warranties, *&c.* may be defeated by Defeaſance made afterwards, for ſuch Inheritance are executory.

237. Tho' a Power of Revocation of an Eſtate paſſing by Conveyance at Common Law be repugnant and void, yet where an Eſtate paſſes by Way of Uſe executed, by 27 *H.* 8. ſuch

ſuch a Power of Revocation of the Uſe, *and conſequently of the Eſtate*, has been allowed to be good: As if a Man covenant to ſtand ſeis'd to the Uſe of himſelf for L. and after to the Uſe of his Son in T. *&c. Proviſo* that he may revoke any of the ſaid Uſes, and afterwards revoke 'em, he is ſeis'd in Fee again without Entry or Claim, and he may revoke Part at one Time and Part at another. But by making a Feoffment or levying a Fine of Part, he extinguiſhes his Power as to that.

Where the Power of Revocation is given to a Stranger, he can't any Way releaſe it, *for another may give me a Power over himſelf or his Eſtate, whether I will or no.* But ſuch Power reſerv'd to him from whom the Eſtate paſſes may be releas'd by Deed, or by levying a Fine, *which is a Releaſe in Law; for it is in Nature of a Condition, whereby he may reſtore himſelf to his former Eſtate whenever he pleaſes, and conſequently ſuch Power, like other Reſervations, may be releas'd.* By the ſame Conveyance by which the old Uſes are revoked, new ones may be limited.

Of Deſcents which take away Entries.

DEſcents of corporeal Inheritances, either in Fee or in Tail, take away the Entry of him that has Right: As if a Diſs'or die ſeis'd, and his Land deſcend to his Heir. But the Deſcent of incorporeal Hereditaments puts not him that has Right to his Action.

Formerly

Formerly if a Diſs'or had long continued in quiet Poſſeſſion, or his Feoffee a Day and Year, the Diſs'ee could not have entred.

If Land be recovered againſt *A.* and he die before Execution, or if there be a Recovery againſt Leſſee L. and he die, and the Rem'r Man alſo die ſeis'd before Execution, the Recoveror *may enter without being driven to a new Action, becauſe it ſhall be intended, that if his Title be good againſt the one, it is good againſt the other.*

But if, after Execution had, the Recoveree had diſſeis'd the Recoveror, and died ſeis'd, the Deſcent ſhould take away the Entry of the Recoveror, *but this is expreſly contradicted in* Keilway 45. b. *becauſe the Heir is privy to the Recovery.*

A. recovers againſt *B.* in a Writ of Right of Advowſon, or is his Conuſee of a Fine of the Advowſon, and *B.* uſurps the next Turn, *A.* is out of Poſſeſſion, for at Law every Preſentation by Right or Wrong, put all Perſons to their Writ of Right.

By 32 *H.* 8. 33. no Dying ſeis'd, *&c.* of a Diſs'or takes away an Entry, unleſs he have been in quiet Poſſeſſion for five Years after the Diſs'in; but 'tis ſaid, that the Statute extends not to Abators or Intruders, nor to the Diſs'or's Feoffee; but it extends to all Diſs'ins with or without Force, and to Succeſſors whoſe Predeceſſors were diſſeis'd, tho' it only ſpeaks of the Diſs'ee and his Heirs; if Leſſee L. be diſſeis'd, and the Diſs'or die within the five Years, and then Leſſee die, it is ſaid that Rem'r Man can't

can't enter, for his Entry was not lawful at the Time of the Deſcent, as the Statute ſpeaks; but if the Leſſee had died before the Deſcent, the Rem'r Man might enter. After the five Years, Diſs'ee muſt make continual Claim as before the Statute.

A Deſcent of an Eſtate in Tail alſo takes away the Entry of him that has Right; as when a Diſs'or makes a Gift in T. and Donee dies ſeis'd. But if the Donee diſcontinue, and diſſeiſe the Diſcontinuee, and die ſeis'd, his Iſſue is remitted, and Diſs'ee may enter, for the Eſtate that deſcended is vaniſh'd. So if an Eſtate T. deſcend, and after determine for Want of Iſſue, Diſs'ee may enter on him in Rev'n or Rem'r.

No Writ of Entry in the Poſt lay at Law after a Conveyance beyond the Degrees. 239.

Thoſe that are in by Wrong, as Diſs'ors, *&c.* Succeſſors, K. being Grantee, K.'s Patentee, Ten't by Curteſy, Woman endow'd by Diſs'or, Lord by Eſcheat, Recoveror, Conuſee of a Fine, Ten't by Execution of the Uſe by Statute, are all in the *Poſt*; but a Woman endow'd by the Heir is adjudg'd in by her Husband. Vide ſupra 82.

Tho' the Land be conveyed beyond the Degrees, it may be brought back, as if the 3d Feoffee re-infeoff the 2d.

Rem'r Man after Death of Leſſee L. is in the *Per* by the Diſs'or.

To take away an Entry, there muſt be a Dying ſeis'd in Demeſne, either in Fee, or T. and alſo a Deſcent; therefore, if a Diſs'or make a Leaſe to *A.* and his Heirs for *B.*'s Life, and *A.* die ſeis'd, or if he make a

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Leaſe L. Rem'r to K. (whoſe Eſtate can't be wrongfully deveſted,) and the Leſſee be diſſeis'd, and the Diſs'or die ſeis'd, ſuch Deſcents of a State L. take not away the Entry of the Diſs'ee. But if he in Rev'n or Rem'r in Fee or T. diſſeiſe Leſſee L. and die ſeis'd, this takes away the Diſs'ee's Entry. And a Dying ſeis'd in Law is ſufficient; if an Infant's Diſs'or die ſeis'd, the Infant comes to Age, the Diſs'or's Heir dies before he enters, this takes away the Entry of the Diſs'ee, (and yet if one that was only ſeis'd in Law make a Feoffment of other Land with Warranty, and die, ſuch Land whereof he was only ſeis'd in Law, ſhall not be recover'd in Value from the Heir.)

If a Diſs'or make a Leaſe L. and then die ſeis'd of the Rev'n, this takes not away the Entry of the Diſs'ee. And ſo if he make a Leaſe for his own L. and die, the Diſs'ee may enter, for tho' the Fee and Freehold deſcended from the Diſs'or, yet he died not ſeis'd thereof. But if he only make a Leaſe Y. or ſuffer Execution of a Judgment in Debt, and die, the Diſs'ee can't enter.

240. If a Diſs'or or his Alienee die without Heir, yet the Eſcheat of the Fee to the Lord takes not away the Diſſeiſee's Entry; but if they had died ſeiſed, and the Land had deſcended, the Entry had been taken away, and then if the Land eſcheat after the Deſcent, the Diſs'ee cannot enter upon the Lord.

If a Feoffee on Condition die ſeiſed, and the Condition be broken before or after the Deſcent;

Deſcent; or if he be diſſeiſed, and a Deſcent caſt, by which his Entry is taken away, yet the Feoffor may enter for a Breach, for he has no Action, and if he ſhould loſe his Entry, he ſhould be without Remedy. In like Manner he, that has Title of Entry for Mortmain, Conſent to Raviſhment, or by Force of a Deviſe, or K.'s Patent, ſhall not loſe it by a Deſcent, becauſe it is the only Remedy. Y Vide ſupra 165.

If a Diſs'or die ſeiſed, and his Heir enter and endow his Wife of the 3d Part, the Diſs'ee may enter on that, for ſhe is in by her Husband, and the Law judges no mean Seiſin between Husband and Wife. A Meſne grants to acquit the Tenant againſt the Lord and his Heirs, the Lord dies, his Wife is endowed of the Seigniory, the Acquittal extends to her, for ſhe continues her Huſband's Eſtate, and the Rev'n is in the Heir. 241.

A Diſs'or dies ſeiſed, the Diſs'ee abates, the Diſs'or's Wife recovers Dower againſt him by Confeſſion; he ſhall not enter on her, but ſome ſay, if he had only endowed her *in Pais*, he might enter upon her. One makes a Gift in T. rendring 20 *s.* Donee dies without Iſſue, his Wife is endowed by the Donor's Heir, ſhe ſhall be attendant to him for the 3d Part of the ſaid Rent, and yet the Tail is ſpent, and the Rent reſerv'd thereon determined. If there be Lord and Tenant, and the Wife of the Ten't be endowed, ſhe ſhall be attendant for the Services of Right due, not for thoſe incroached. Y

* because Dower is a continu of Huſb's Title

If

If a Diſs'or after the Deſcent take a State L. or if a Diſs'or make a Leaſe L. and grant the Rev'n to the K. yet the Diſs'ee, by Re-entring on Leſſee L. deveſts the Rev'n.

If a Feme Diſs'oreſs marry, and die ſeiſed, and her Husband being Ten't by Curteſy die, and then the Land deſcend, or if Tenant in Fee, or T. die without Iſſue or Heir, leaving Wife *Privement Enſeint*, and after the Iſſue is born, and the Land deſcends to him; yet this bars no Entry, becauſe the Land deſcends not immediately after the Death of him that died ſeiſed.

After a Deſcent is caſt, and the Diſſee's Entry is taken away, if the Diſs'or come to a State of Freehold in the Land by Purchaſe or Deſcent, the Diſs'ee may enter, or have his Aſſiſe againſt him, for he can have no Benefit of the Deſcent, who is *Particeps Criminis*.

242. If one die ſeiſed in Fee, or T. and leave two Sons, and the younger whether of the whole or Half Blood abate, and have Iſſue and die, yet may the elder or his Heir enter; for it ſhall be intended, *that the younger did not ſet up a new Title, but* that he claimed as Heir to his Father *in his elder Brother's Abſence, and that it was his Intent to preſerve the Poſſeſſion againſt Strangers; for this Reaſon* one Brother ſhall not have *Mortanceſtor* againſt the other. And the Law is the ſame if there be divers Deſcents, or if the eldeſt Brother enter into *Burgh Eng.* Land.

Plowd. Com. 306. a.

If

If one Parcener enter generally, and take the Profits, this ſhall be accounted the Entry of them both; but if ſhe enter ſpecially, claiming the whole Land, and taking the whole Profits ſhe is an Abator, and yet if ſhe die ſeiſed, the other ſhall enter; but if ſhe make a Feoffment of all, and take back an Eſtate in Fee, and died ſeiſed, the other can't enter for the Feoffment deſtroys the Privity. 243. Hob. 120.

And in the Caſe above, if the elder Son had enter'd firſt, or if the Father had made a Leaſe Y. and the younger Brother had diſſeiſed the elder, and died ſeiſed, the Entry of the Elder had been taken away; for *it can't be intended, that in theſe Caſes the younger Brother affirm'd the Title of the Elder, or entered to preſerve it when he diſſeiſed him to his own Uſe.* So if the younger Son's Feoffee die ſeiſed, the Deſcent takes away the elder Brother's Entry; ſo if a Stranger abate, and the younger Brother diſſeiſe him and die ſeiſed.

If Tent in ſpecial T. have Iſſue a Daughter, and takes a 2d Wife, and have a Son, who enters after his Death, and dies ſeis'd, this bars the Daughter's Entry, for they claim not by one Title.

An (*a*) Uſurpation by one Parcener after Partition puts not the other out of Poſſeſſion. If Parceners can't agree to preſent, the Church is not Litigious, *ſo that the Ordinary may juſtify Refuſing the Clerk of either, and ſuffer the Church to lapſe, but he muſt take the Clerk of the Eldeſt.* If the youngeſt (*a*) Q. Watſ. 84. Vide Watſ. 74.

youngeſt Son were found Heir on a Writ of *Diem Clauſit Extremum*, the other had no Remedy. When two Parſons preſented by one Patron are in Debate for Tithes, no *Indicavit* lies; the Reaſon of all theſe Caſes is, becauſe the Parties claim by one Title.

Vide ſupra 125.

244. One ſeiſed in Fee leaves two Sons, Baſtard Eigne, Mulier Puiſne, the Baſtard claims as Heir, and dies ſeiſed, and the Land deſcends to his Iſſue, the Right of the Mulier, or any other Heir lineal or collateral, is remedileſs, whether the Deſcent were of an Inheritance lying in Grant or Livery, and whether the Mulier, *&c.* be of full Age, or an Infant or Feme Covert; and if the Mulier leave a Wife *Privement Enſeint*, and the Baſtard die, the Child born ſhall be barr'd; and the Law is the ſame if the Baſtard become profeſs'd; or if he die in his Father's Life, and his Iſſue enter as Heir to the Grandfather, and die ſeiſed; and if there be two Daughters Baſtard and Mulier, and the Baſtard after the Death of the Father enter with her Siſter, and occupy peaceably and die, her Iſſue ſhall inherit, and if they make Partition, the Mulier ſhall be bound for ever. For *Injuſtum eſt aliquem poſt Mortem facere Baſtardum, qui toto tempore Vitæ ſuæ pro Legitimo habebatur.* 3 Lev. 410. *But this Rule holds only as to Baſtard Eigne.*

But a Mulier ſhall not be barr'd by the Baſtard's dying ſeiſed, unleſs the Inheritance deſcend; therefore if the Baſtard leave a Wife *Privement Enſeint*, and the Mulier enter before the Child is born, he ſaves his

his Right: Nor ſhall a Mulier be barr'd by an Eſcheat to the Lord of the Fee. Nor ſhall the Right to an Eſtate T. be barr'd by the Baſtard's dying ſeiſed.

A *Mortanceſtor* lies not between a Baſtard and a Mulier: And a Baſtard being impleaded ſhall have his Age.

If a Wife have a Child born in Wedlock, tho' the next Day after Marriage, no Proof can be that it is not her Husband's, if he be within the Four Seas, *i.e.* in the K. of *England*'s Juriſdiction, unleſs he have an apparent Impoſſibility of Procreation, as if he be but 8 Years old; *but it has been lately reſolv'd, that it ſhall be preſumed, that a Child born after a Divorce* a Menſa & Thoro *is a Baſtard, unleſs the contrary be proved on the other Side.* *Queen and Inhabitants of* Weſtminſter. 2.

Note, That a Baſtard here ſpoken of, is one born before Marriage, whoſe Mother is afterwards married to his Father, who is ſo much favour'd, becauſe the Canon Law makes him Legitimate.

If the Mulier interrupt the Baſtard's Poſſeſſion, or a Stranger do it, and he agree in the Baſtard's Life, (as when a Stranger enters to avoid a Fine, and within the five Years he that has Right Aſſents,) in this Caſe the Re-entry of Baſtard, and his dying ſeiſed, bars not the Right of the Mulier; but if the Baſtard recover in Aſſiſe againſt the Mulier, this avoids the Interruption of the Baſtard's Poſſeſſion by the Mulier's Entry. 245.

If the Mulier come on the Land by Conſent of the Baſtard, he ſhall not avoid his Poſſeſſion thereby, but if he cut down a Tree, or do any other Act which muſt be either a Treſpaſs or an Entry, he thereby avoids the Baſtard's Poſſeſſion; for where an Act may be done lawfully, the Law will not adjudge it to be wrongful.

If the Baſtard enter, and K. ſeiſe for a ſuppos'd Contempt, *&c.* of the Baſtard, and he die, and his Iſſue be reſtor'd on Petition, the Mulier is barr'd, for the Poſſeſſion of K. when he has no good Right to ſeiſe, ſhall be judg'd to be the Poſſeſſion of him in whoſe Right he ſeis'd. But if after the Father's Death the Mulier be found Heir *of Kt. Service Land*, and within Age, and K. ſeiſe, the Baſtard is foreclos'd for ever; and if K. ſeiſe for a Contempt of the Anceſtor, and the Iſſue of the Baſtard be reſtored on his Petition, for that K. ſeis'd without Cauſe the Mulier is not barr'd.

Any Stranger may enter of his own Head on the Diſs'or, or the Feoffee of Ten't L. and deveſt the wrongful Eſtate; but a Stranger can't enter on the Feoffee of an Infant of his own Head.

If an Infant be diſſeiſed, and a Deſcent caſt during his Infancy, yet may he enter. But if one die ſeiſed, and leave a Wife *Privement Enſeint*, and a Stranger abate and die ſeis'd, the Child born can't enter, for he is not ſo much regarded in Law, becauſe he had no Right at the Time of the Deſcent.

If an Infant preſent not to a Church within 6 Months, it ſhall lapſe; if the five Years for making a Claim after a Fine begin in the Anceſtor's Life, he muſt claim within them; if he do not claim a Villein fled into ancient Demeſne within a Year and Day, he can't afterwards claim him; and he ſhall be barr'd in an Appeal of the Death of his Anceſtor, if he do not bring it within a Year and a Day; Ten't T. diſcontinues, Diſcontinuee dies, and leaves an Heir within Age, Ten't T. abates and dies ſeiſed, his Iſſue is remitted, and the Infant can't enter; if K. die ſeiſed, the Infant is driven to his Petition; for in theſe Caſes the Law prefers the Good of the Church, the publick Repoſe of the Realm, Liberty, Life, an ancient Right, and King's Prerogative before the Privilege of Infancy. 246. 4 Rep. 58. b.

A Deſcent caſt of Land, in which a Feme Covert has Right of Entry, ſhall take away the Husband's Entry, but not that of the Wife or her Heirs after his Death; but if the Woman had Right of Entry, before ſhe married, and being of full Age had married, the Deſcent caſt during the Coverture had bound her. If a Rent be reſerv'd on a Feoffment, and if not paid in a Month, to be doubled: An Infant neglecting the Payment ſhall not forfeit any Thing, but a Feme Covert ſhall, for the Statute *Non current uſuræ, &c.* extends not to a Feme Covert. Mert. ca. 5.

Four Sorts of Men may be ſaid to be *Non Compos.* 1. An Idcot that is *Non Compos* 247.

pos from his Nativity. 2. One made ſuch by Sickneſs. 3. A Lunatick, *qui aliquando gaudet lucidis Intervallis*, who is *Non Compos* only for the Time while he wants Underſtanding. 4. One that is drunk, who is never favoured in any Caſe, *ſed omne crimen ebrietas incendit & detegit.* If any of the three firſt be diſſeiſed, a Deſcent bars their Entry, for they can't in civil Cauſes diſable themſelves, for which Cauſe, if they recover their Memory, they can't in the Courts of Common Law avoid any Conveyance made by them during their Infirmity; *for a Matter of this Nature is moſt proper to be left to the Conſcience of a Judge of Equity, but it ſeems againſt natural Juſtice to put ſuch Perſons recovering their Memory wholly without Remedy, who were impoſed upon when they wanted Underſtanding.* K. on an Office, finding a Perſon an Indeot or Lunatick, may avoid Conveyances made by them in *Pais*, but not thoſe of Record, and ſo may their Heirs after their Death. And in criminal Cauſes they may diſable themſelves.

4 Rep. 126. b.

The Heirs of one perpetually *Non Compos* may avoid a Deſcent caſt in the Life of ſuch Anceſtor by Entry or Action; ſo they may avoid a Feoffment made by them or a Lunatick; and ſo *Note*, they have Remedy as Heirs, which the Anceſtors had not; ſo if Father diſſeiſe Grandfather and make a Feoffment without Warranty, and Grandfather and Father die, the Son may enter, tho' the Father could not. There are two Jointenants, one for L. the other in Fee,

the Heir of him that has Fee ſhall have Waſte, tho' the Anceſtor could not.

An Infant diſſeiſes *A.* and makes a Feoffment to *B.* who dies ſeis'd, the Infant being within Age, the Infant enters upon his Heir, *A.* may enter upon him; ſo if a Diſs'or make a Feoffment on Condition, Feoffee dies, and Feoffor enters for a Breach, the Diſs'ee may enter upon him. 248.

If a Diſs'or be profeſs'd, the Deſcent to his Heir takes not away the Entry of the Feoffee, for it is originally owing to his own Act, but the Heir of one profeſs'd ſhall have his Age. If the Ten't to a *Præcipe* become profeſs'd, or reſign, *&c.* the Writ abates not, but if he be depriv'd it ſhall.

Leſſee Y. is ouſted, and he in Rev'n diſſeis'd, Diſs'or dies ſeis'd, yet may Leſſee enter, for by it he defeats not the Freehold that deſcended. So (*a*) if Grantor of three Avoidances uſurp the firſt Turn, this puts not the Grantee out of Poſſeſſion. 249.

(*a*) Vide Watſ. 85.

If one diſſeiſe another in Time of War, which is called Occupation, and die ſeiſed alſo in Time of War, Diſs'ee may enter; and if one preſent wrongfully to a Church in Time of War, he does not put the Patron out of Poſſeſſion, tho' the Inſtitution were in Time of Peace. It is ſaid to be Time of Peace when K.'s Courts are open.

If a Body Politick die ſeis'd of Land, to which I have a Right of Entry, and the Land go to his Succeſſor, yet I may enter. 250.

Of Continual Claim.

IF Diſs'ee make continual Claim unto the Lands, whereof the Diſs'or or his Donee or Feoffee is ſeiſs'd, or he in Rev'n or Rem'r make continual Claim upon the Alienee of a particular Ten't guilty of a Forfeiture, before a Deſcent caſt, they ſave their Entry thereby notwithſtanding the Deſcent. If Ten't Y. or by Execution, be ouſted, and he in Rev'n diſſeis'd, yet may he in Rev'n enter to avoid a Deſcent or collateral Warranty, or he may recover in Aſſiſe, and yet his Entry is not lawful to take the Profits; and ſome ſay that Leſſor L. may do the ſame.

251. If one make a Leaſe L. Rem'r L. Rem'r in Fee, and Ten't L. forfeit, and he in Rem'r L. claim, and Alienee die ſeiſed, and then he in Rem'r L. die, he in Rem'r in Fee may enter, for he could not enter before the Deſcent was caſt; ſo if the Father having claim'd before a Deſcent caſt die, his Son ſhall enter: But if he in Rem'r L. or Anceſtor claim, and die before the Deſcent, this gives no Advantage to him in Rem'r in Fee, or to the Heir, for the Claim of another ſhall not avail one that might have claim'd himſelf, and did not.

252. *b.* If there be two Jointenants and one claim, and die, the other ſhall enter: If Ten't T. with Warranty, have Judgment to recover in Value, and die without Iſſue before Execution, he in Rem'r may ſue Execution: If a Seigniory be granted for L. Rem'r in Fee, and

and Grantee L. die, he in Rem'r in Fee ſhall have a *per quæ Servitia.*

Forfeiture of a particular Eſtate is either by Matter in *Pais*, or of Record; a Forfeiture in *Pais* is of Things that lie in Livery, when a greater Eſtate paſſes than the Ten't can lawfully make, whereby the Rev'n or Rem'r is deveſted. If Ten't L. and Rem'r Man for L. join in a Feoffment, both their Eſtates are forfeited. If Rem'r Man for L. diſſeiſe Ten't L. and make a Feoffment, this forfeits the Right of his Rem'r. If K.'s Ten't L. or Y. make a Feoffment, the Solemnity of the Livery, tending to the K.'s Diſheriſon, is a Forfeiture, tho' the K.'s Eſtate can't be deveſted. But no Grant by Deed can forfeit Things lying in Grant.

Forfeiture by Record is, 1. By Alienation, as Fine and Recovery, whether it deveſt the Rev'n or Rem'r, as in caſe of Things lying in Livery, or deveſt them not, as in caſe of Things lying in Grant. But a Deed inroll'd cauſes no Forfeiture, *becauſe the Deed it ſelf, which makes the Conveyance, is meerly Matter in* Pais, *tho' it be afterwards recorded.*

2. By Claim, either expreſs, as when Ten't L. claims Fee in Court of Record, or Leſſee Y. brings Aſſiſe; or imply'd, as when Ten't L. joins the *Miſe* on the meer Right, or Leſſee Y. loſes in a *Præcipe*, and brings Error for Error in Proceſs; *for (a) a Writ of Error to reverſe a Recovery of a Freehold lies for the Ten't of the Freehold only, and therefore it is a Forfeiture for Leſſee Y. to bring it; ſo that where Leſſee Y. is ſummoned, and loſes by Default, he has no Remedy, but if he were*

(a) Dyer 30, 5. Co Lit. 22, a.

ſummon'd, and did appear, he might have pleaded in Abatement that no Ten't of Freehold was nam'd in the Writ; if he were not ſum-
1 Ro. 622. *mon'd, I ſuppoſe that he might have an Action grounded on the Deceit.*

252. 3. By affirming the Rev'n or Rem'r to be in a Stranger, as praying in Aid of, or attorning to the Grant of a Stranger, (but the Ten't ſhall not forfeit his Eſtate by attorning in *Pais*,) or by confeſſing the Action in a *Caſu Proviſo* brought by a Stranger, or by pleading covenouſly to the Diſheriſon of him in Rev'n or Rem'r, or by pleading *nul Waſt fait*, in an Action of Waſte done by a Stranger, or by accepting a Fine of a Stranger *ſur conuſans de droit come ceo que il ad de ſon done.*

Every paticular Ten't may forfeit, whether for L. Y. or by Execution, as Ten't by Statute Merchant, *&c.* and Ten't T. *apres*, and Leſſee to him and his Heirs for Life of
Supra 782. *J. S.* If Ten't L. make a Leaſe for *B.*'s Life, or on Condition, and *B.* die, or the Condition be broken, yet the Forfeiture remains.

253. If one have Cauſe to enter into divers Lands in the ſame County, an Entry into Part in the Name of all, to which he has a Right of Entry regains the Seiſin of all in the ſame County; but a general Entry into any one Parcel, regains no more than that one Parcel: And if ſeveral Actions be required, as if one be diſſeis'd by two ſeveral Diſs'ors, or by one Diſs'or, and he leaſe to three ſeverally for L. there muſt be ſeveral Entries: But if he leaſe to many ſeverally for Years,

one

one Entry will be ſufficient; ſo if I be diſſeis'd of ſeveral Parcels of Land by the ſame Perſon at ſeveral Times, or if ſeveral Parcels of Land be ſubject to one Condition, one Entry is ſufficient for all; but if the Conditions be ſeveral, there muſt be ſeveral Entries. Tho' Livery within View be good, yet a Claim within View where a Man may enter without Fear, is not. Livery of Parcel of Land in the Name of all in the ſame County, paſſes all.

If he who has a Title to enter, dare not enter for Fear of Battery, Maiming, or Death, if he go as near as he dares, and claim the Lands, he has preſently by his Claim ſuch a Seiſin as if he had entred indeed, tho' he never had any Seiſin before. But his Fear muſt concern his Perſon; for the Fear of the Burning of his Houſes, or Loſs of his Goods, is not ſufficient. The Fear of Impriſonment, *or Mayhem*, is not only ſufficient to make ſuch a Claim equivalent to an actual Entry, but will alſo avoid a Deed executed by a Man under ſuch Fear; but the Fear of Battery is not ſufficient in the later Caſe, but in the firſt it is, *for the Re-continuance of an ancient Right is favour'd in Law.* In Pleading, ſome juſt Cauſe of Fear muſt be ſhewn, and it muſt be no vain Fear: But in a Special Verdict, if the Jury find that the Diſſeiſee did not enter for Fear of corporal Hurt, this is ſufficient, and it ſhall be intended that they had Evidence to prove the ſame. 254. 2 Inſt. 483.

Such an Entry in Law, tho' it ſhall be taken as much for one's Advantage as an Entry in Deed, as to avoid a Warranty, or to

enable one to bring an Aſſiſe, *&c.* yet it ſhall not be ſo to one's Diſadvantage; therefore ſuch an Entry by the Plaintiff in Aſſiſe abates not the Writ, but he ſhall recover Damages from the Beginning.

Continual Claim is well made, tho' it be made but once, when the Diſſeiſee approaches as near to the Land as he dares, and claims in or out of View, but if he dare he muſt enter; yet a Claim within View reduces a Freehold in Law to an actual Freehold, tho' he that makes ſuch Claim be not afraid to enter.

255. A dying ſeis'd and Deſcent within a Year and Day after claim made, takes not away the Entry of him that claim'd, tho' there be never ſo many Diſſeiſins, Alienations, or Deſcents within that Time, and tho' it were not made till many Years after the Diſſeiſin; but at Law, a Deſcent caſt within a Year and a Day after the Diſſeiſin barr'd the Diſ-
256. ſeiſee not making continual Claim; but this has been alter'd by 32 *H.* 8. 33. *Since which Statute no Dying ſeis'd within five Years after the Diſſeiſin takes away an Entry, and conſequently the Ten't s dying ſeis'd within five Years after the continual Claim takes not away an Entry, becauſe the Ten't's continuing in Poſſeſſion after the continual Claim amounts to a new Diſſeiſin.*

In the Computation of the Year and Day, the Day on which the Claim was made is the firſt; and at Law you could not have been ſecure unleſs you had made a new Claim within the firſt Year and Day, and ſo on.

The

The Year and Day is in many Caſes the Time limited by Law; as Non-claim for that Time after a Fine did at Law bar all Parties, as ſuch Non-claim after final Judgment in a Writ of Right ſtill does; ſo a Villein fled to ancient Demeſn, and not claimed by the Lord in a Year and Day, can't afterwards be ſeis'd by him: If a Man wounded die not within a Year and Day, it is no Felony: No Execution can be ſued after the Year and Day in real or perſonal Actions without a *Scire Facias*. 254. *b.*

If the Ten't on whom ſuch Caim is made be ſeis'd in Tail, immediately after ſuch Claim he becomes ſeis'd in Fee, for his Occupation after it is a Diſs'in: And the Diſs'ee, as often as his Diſs'or continues his Occupation after Claim made, ſo often may bring Treſpaſs: He ſhall recover Damages for the firſt Entry without any Regreſs, but after Regreſs he ſhall in Treſpaſs with a *Continuando*, recover Damages for all the mean Occupation. 256. *b.*

Or he that makes ſuch Claim may have an Action on the 5 *R.* 2. 7. and ſuppoſe that his Adverſary entred where his Entry was not given him by Law, and in ſuch Action he ſhall recover Damages and Coſts for the firſt Entry, but not for the mean Profits, tho' he made Regreſs. And if his Adverſary occupied the Tenements with Force and Arms, or with a Multitude of People when he claim'd, he may have a Writ of forcible Entry, and recover treble Damages. 257.

One may commit a Force, three or more a Riot, Rout, or unlawful Aſſembly; how

many make a Multitude is not determin'd, but it is left to the Judges Decretion.

This Writ of forcible Entry is grounded on the 8 *H.* 6. 9. and recovers treble Damages and Coſts as well for the mean Occupation as the firſt Entry; it lies for an Entry by Force, or peaceful Entry and forcible Detainer, or forcible Entry and forcible Detainer: But there muſt be actual Force, and not ſuch as the Law implies in every Treſpaſs, Reſcous and Diſs'in. Unuſual Weapons, or unuſual Number of Servants, Threats or Violence, make Force: All that go to make a forcible Entry are guilty, tho' one only uſe the Violence.

258. Continual Claim made by a Servant for his Maſter is good, if he enter into a Part and claim, *&c.* or if the Maſter ſay that he dares not go to any Part of the Land, nor approach nearer than to *D.* and command his Servant to go to *D.* and claim, and the Servant do ſo, this is ſufficient, tho' the Servant had no Fear, for he doth as much as he was commanded to do, and all that his Maſter durſt or ought by the Law to do.

But if the Maſter be in Health, and command his Servant to go to the Land and claim, *&c.* in this Caſe a Claim made by Servant as near as he dares is void, for he does not do all that is commanded, nor ſo much as the Maſter durſt have done.

✗ But if the Maſter be ſick, or a Recluſe, ſo that by Reaſon of his Order he can't go, and he command his Seavant to go and claim for him, and the Servant go as near as

as he dares by Reaſon of Fear, *&c.* this is ſufficient tho' the Command were to go to the Land; and yet regularly, when a Servant does leſs than the Command, his Act is void; *for where a Man is forced to make uſe of a Servant, he is more favoured than one who is able to do his own Buſineſs; and if the Servant do as much as it may be preſumed his Maſter would have done himſelf it is ſufficient,* for *impotentia excuſat Legem*; when a Servant exceeds his Maſter's Command, it is void only ſo far as he hath exceeded.

A Recluſe, who by Reaſon of his Order cannot go out of his Houſe, ſhall always appear by Attorney in ſuch Caſes where others muſt appear in proper Perſon.

If a Man impriſon'd be diſſeiſed, and a Deſcent caſt while he is in Priſon, yet may he enter; for by Intendment of Law, one in Priſon is kept ſo cloſe that he has no Intelligence of Things done abroad, but if he were at large when diſſeiſed, a Deſcent during his Impriſonment binds him. 259.

Alſo if one in Priſon, againſt his own Conſent, without Covin, be outlaw'd, he ſhall reverſe it by Writ of Error; but being Matter of Fact, he can't by Reaſon of it avoid the Outlawry by Plea, unleſs in caſe of Felony, for there *in favorem vitæ* he may plead it; and when the Defendant comes in on the *Capias Utlagatum, &c.* he may by Plea reverſe the ſame for Matters apparent, as in reſpect of a *Superſedeas*, Omiſſion of Proceſs, *&c.* But *quære* if this can be done in another Term.

Alſo if one in Priſon loſe his Lands by Default in a real Action, he ſhall avoid it by a Writ of Error; but he can't have a Writ of Deceit; becauſe the Summons was lawful.

260. Records are legally the Memorials of Courts of Record, which hold Plea of Actions *vi & armis*, or where the Debt or Damages amount to 40 *s.* or more, and proceed according to Common Law; and ſuch Courts are created by Parliament, Letters Patents, or Preſcription; but the Rolls of other Courts proceeding by other Laws are not Records. There can be no Averment, Plea or Proof againſt a Record; and if it be alledged and denied, it ſhall be tried by it ſelf only. The Record is in the Judge's Breaſt during the Term, and alterable; but after the Term it is in the Roll, and admits no Alteration, Averment, or Proof to the contrary. *Null tiel* Record cannot be pleaded to Letters Patents pleaded and ſhew'd forth; *Non conceſſit* may.

One in Priſon may on Motion be brought to the Bar, and either muſt anſwer according to Law, or elſe, the ſame being recorded, the Law ſhall proceed againſt him.

261. If one out of the Realm be diſſeiſed, and a Deſcent caſt, yet his Entry is not barr'd, whether he were in the K.'s Service or not: But if he were diſſeiſed before he went beyond Sea, his Entry is taken away by the Deſcent. Tho' *altum Mare*

Mare be not within the Jurisdiction of Common Law, yet the Sea of *England* is within the Realm of *England*. To be *infra quatuor Maria*, is by Conſtruction to be within the Realm of *England* or its Dominions; yet a Man may in Truth be *infra quatuor Maria*, and yet out of the Realm of *England*.

It ſeems that one out of the Realm ſhall not by Writ of Error avoid a Recovery in a *Præcipe*, becauſe he may have a Writ of a higher Nature; but he may avoid an Outlawry, for otherwiſe he would be without Remedy.

Matters done out of the Realm of *England* concerning War, Combat or Arms, ſhall be determined by Civil Law, before the Conſtable and Marſhal, and the Trial ſhall be by Witneſſes or Combat.

In any Action, if the Defendant alledge, that the Plaintiff is an Alien born in *France* out of K.'s Ligeance, the Plaintiff may reply, that he was born in *England* in ſuch a Place within the K.'s Ligeance; and hereupon the Jury ſhall be charged, and on Evidence that he was born in *France*, *&c.* they ſhall find that he was born out of the K.'s Ligeance: On Evidence that he was born in *England* or *Ireland*, *&c.* they ſhall find that he was born within the K.'s Ligeance. So if one plead in Avoidance of a Fine that he was out of the Realm, in *S.* at the Time the adverſe Party may alledge that he was in *England* at ſuch a Place, and thereon Iſſue ſhall be joined, and

Supra 189.

and then on Evidence he may prove that he was out of the Realm, *&c.* which the Jury ought to find. And in ſuch Caſes in a ſpecial Verdict the Jury may find that he was born beyond Sea, or was beyond Sea at the Time, *&c.*

Adhering to the K.'s Enemies without the Realm, was Treaſon before the 25 *E.* 3. and triable in *England*, but the Adherency muſt of Neceſſity be alledged in ſome Part of *England*. Now by 32 *H.* 8. 2. Treaſon out of the Realm ſhall be enquired of, tried, and determined in the *K.'s Bench*, or before Commiſſioners in ſuch County as the K. ſhall appoint, in ſuch Manner as if it had been done in the ſame County where it is enquired of.

In an Action of Covenant on a Charter-party made at *Thetford* in *Norfolk*, or any other Part of *England*, if an Iſſue be taken concerning the Performance of a Matter covenanted to be done beyond Sea, it ſhall be tried at *Thetford*, *&c.* where the Action is brought, becauſe the Contract took its Original there by making of the Charter-party; *but generally where the Contract and the Performance thereof are to be both out of the Realm, it can't be tried at Common Law,* 6 Co. 47. b. Hob. 11. *except in Caſe of a* Bond, *which (being of a particular Nature, taking its Courſe, and binding according to the Common Law,)* tho' it bears Date in a Foreign Country, as in *Bourdeux* in *France*, may be tried here; but *(becauſe the* Venire *for a Jury muſt be from* Cro. Jac. 76. *ſome certain Place)* it muſt of Neceſſity be laid

laid in ſome Place of *England*, as in *quodam loco, vocato Bourdeaux* in *France*, in *Iſlington in Comitatu Middleſex*; nor is it traverſable whether there is ſuch a Place in *Iſlington*.

One out of the Realm never could be barr'd by Non-claim on a Fine.

A Feme Covert, and he in Rev'n or Rem'r on a State of Freehold were barred at Law by the Non-claim of the Husband, or of the particular Ten't within the Year and Day after a Fine levied: To prevent which Miſchief the 34 *E.* 3. 16. was made, which ordain'd that Non-claim on a Fine ſhould be no Bar; and a Feme Covert and he in Rev'n or Rem'r are expreſly provided for by 4 *H.* 7. 24. which makes a Fine levied with Proclamations a Bar to all not claiming within five Years; but if a Fine be levied without Proclamations, the ſaid Statute of Non-claim ſtill extends to it; and Non-claim within a Year and Day after final Judgment in a Writ of Right, is ſtill a Bar to all, for the ſaid Statute of Non-claim does not extend to it. 262.

If a Diſs'ee bring an Aſſiſe, and the Jury find for him, and the Juſtices will be adviſed till next Aſſiſe, and in the mean Time Diſs'or die, it ſeems that the Entry of the Diſs'ee is not taken away, for the Suit did amount to a continual Claim: So if Ten't in Dower alien with Warranty, and the Heir bring a Writ of *Caſu proviſo*, and hanging the Plea, the Ten't die, yet ſhall not the Heir 263.

Heir be barr'd or rebutted by the Warranty, for the *Præcipe* amounted to a continual Claim.

An Appeal or Aſſiſe are ſaid to be arraign'd, when they are ſet in ſuch Order that the Defendant is inforced to anſwer thereunto; and they are arraigned in *French*, but enter'd in *Latin*; but no Man is ſaid to be arraing'd, but at K.'s Suit.

If an Abbot, or Mayor of a Corporation, or Parſon die, and before there be a Succeſſor a Stranger enter into the Lands, *&c.* and a Deſcent be caſt, yet the Succeſſor may enter; for tho' the Stranger by Entry and Claim to him and his Heirs did gain the Fee, yet inaſmuch as the Act of God was the Cauſe that no Claim could be made, it ſhall not prejudice the Succeſſor: And for the ſame Cauſe the Succeſſor may preſent, notwithſtanding an Uſurpation of a Church in Time of Vacation.

264. A Grant made to or by a Body Politick during the Vacation of the Headſhip is void, nor can they ſue till they have a Head; but if a Leaſe L. be made, Rem'r to the Mayor and Commonalty of *B.* there being no Mayor at the Time, 'tis good, if a Mayor be choſen during the particular State.

Of Releaſes.

RElеaſes of all the Right which one has in Land, are commonly made in ſuch Form, *Noverint univerſi per Præſentes me* A. *de* B. *remiſiſſe, relaxaſſe, & omnino de me & hæredibus meis quietum clamaſſe*: vel ſic, *pro me*

me & hæredibus meis quietum clamaſſe C. *de* D. *totum jus, titulum, & clameum quæ habui, habeo, vel quoviſmodo in futurum habere potero, de & in uno Meſſuagio cum pertinentiis in* F. *&c. Note*; The ſaid three Words *remiſiſſe, relaxaſſe, & quietum clamaſſe*, are of the ſame Effect; and there be other Words of Releaſe, as *renunciare, acquietare*; ſo if a Leſſor grant to his Leſſee that he ſhall be diſcharg'd of the Rent, this is a good Releaſe.

Releaſes are either expreſs, which muſt be by Deed; or implied, which may be with or without Deed. As if the Lord diſſeiſe the Ten't, and make a Feoffment in Fee, or Diſs'ee diſſeiſe Diſs'or's Heir, and make a Feoffment in Fee: This is a Releaſe in Law of the Seigniory in the firſt Caſe, and both of the Right and Action of the Diſs'ee in the ſecond.

If the Obligor make the Obligee Executor, *who accepts thereof*, this in Law releaſes the Action; but the Duty remains, for which he may retain, *&c.*

If there be two Feme Obligees, and one of 'em marry the Obligor, or if an Infant at 17 makes his Debtor Executor, this is in Law a Releaſe; *for as the Law gives him Power to make an Executor; it gives his Executor the ſame Advantages with others.* But if a Feme Executrix marry a Debtor, this is no Releaſe, for if it ſhould be one, it would be a *Devaſtavit*, which an Act in Law never works.

If a Diſs'ee releaſe to his Diſs'or's Leſſee L. his Right is gone for ever; but if he diſſeiſe

diſſeiſe his Diſs'or's Heir, and make a Leaſe L. his Right is releas'd but during Leſſee's L. for a Releaſe in Law is more favourably taken according to the Parties Intent, than an expreſs Releaſe in Deed.

265. The Word *Right* in its general Signification includes a Title, for which there is no Remedy by Action but by Entry only.

Theſe Words in Releaſes, *quæ quoviſmodo in futurum habere potero*, are void, for a mere Poſſibility can't be releas'd, therefore if the Son ſhould make ſuch a Releaſe to his Father's Diſs'or in the Father's Life, yet might he enter after his Death, unleſs there were a Clauſe of Warranty in the Releaſe. If Father diſſeiſe Grandfather, make a Feoffment, and Father and Grandfather die, the Son may enter; but if there were a Clauſe of Warranty he ſhould have been barr'd.

A Right to a Rev'n or Rem'r may be preſently releaſed, for one may have a preſent Right to them, tho' it can't take Effect in Poſſeſſion, but *in futuro*. Husband makes a Leaſe L. and dies, the Wife may releaſe her Right of Dower to him in Rev'n, (*becauſe ſhe can't recover her Dower againſt the Leſſee L. without binding his Rev'n,*) yet ſhe has no preſent Cauſe of Action againſt him.

A bare Authority can't be releaſed, therefore the Executors, to whom one deviſes that they ſhall ſell his Land, can't releaſe to the Heir; ſo if *ceſtuyque* Uſe had deviſed that his Feoffees ſhould ſell the Land, and they

they had made a Feoffment over, yet might they have ſold the Uſe.

But tho' theſe Powers in Strangers can't be releaſed, yet a Power of Revocation in the Feoffor, *&c.* may. Vide ſupra 325.

If the Plaintiff releaſe all Demands to the Bail in the *King's Bench*, and afterwards Judgment be given againſt the Principal, Execution may be ſued againſt the Bail; *for in the K.'s Bench, when the Proceeding is by Bill, the Bail are not bound in a certain Sum to the Plaintiff, but only undertake that the Defendant ſhall pay the Condemnation Money, or render his Body to Priſon, ſo that they are but in Nature of Gaolors to the Defendant; but in the* Common Pleas *the Bail are bound to the Plaintiff in a certain Sum:* So if the Conuſee of a Statute releaſe to the Conuſor all his Right to the Land, yet may he ſue Execution, for he has no Right to the Land, but only a Poſſibility.

Regularly none can take a Releaſe of a bare Right to Lands unleſs he have a Freehold in Deed, or in Law, or a Rev'n or Rem'r in Fee, Tail, or for L. veſted in him at the Time of the Releaſe; yet it is not neceſſary that ſuch Rem'r or Rev'n be immediately expectant on the Eſtate in Poſſeſſion; but if the particular Ten't be diſſeis'd, a Releaſe to them in Rev'n or Rem'r during the Poſſeſſion of the Diſs'or, is void. 267. a.

The Vouchee having enter'd into the Warranty, and the Ten't to a *Præcipe*, notwithſtanding he has alien'd, may take a Releaſe from the Demandant, *for they are Ten'ts in Law* 266.

Law as to him, and it is preſumed that they are as much concerned to anſwer his Action as if they were Ten'ts indeed. An Annuity payable by the Parſon, may in Vacation be releaſed to the Patron, *for he is the only Perſon, who by the Temporal Law has then an Intereſt in the Church:* But it ſeems that a Releaſe to the Ordinary only is not good, becauſe it is a Temporal Thing. One Leſſee Y. may take a Releaſe of another; as if ſuch Leſſee be ouſted, and Leſſor diſſeiſed, and Diſs'or make a Leaſe Y. the firſt Leſſee may releaſe to the ſecond: But a Diſs'ee can't releaſe to his Diſs'or's Leſſee Y. but to his Leſſee L. he may. A Feme may releaſe her Right of Dower to Guardian in Chivalry, becauſe a Writ of Dower lies againſt him, and the Heir ſhall take Advantage of it.

There is *jus Proprietatis*, and *jus Poſſeſſionis*, and he that has both is ſaid to have *jus Duplicatum*, or *droit droit*; the Diſs'ee has the 1ſt, the Diſs'or the 2d, and if Diſs'ee releaſe to him, he has both. Regularly when a bare Right is releaſed to one that has *jus Poſſeſſionis*, and afterwards another by a mean Title recovers the Land from the Releaſee, the Right of Poſſeſſion draws the naked Right with it, and leaves no Right in the Releaſee; as if *A.* diſſeiſe the Diſs'or's Heir, and the Diſs'ee releaſe to *A.* and then the Diſs'or's Heir enter upon *A.* or if Diſs'ee diſſeiſe the Diſs'or's Heir, and make a Feoffment, and then the Diſsor's Heir enter upon the Feoffee; in both Caſes the meer Right is, together with the Poſſeſſion, veſted in the Heir of the Diſs'or, who by his Entry wholly defeats the

the Eſtates of the Releaſee, or Feoffee; for if the naked Right ſhould remain in them, it would be againſt a known Maxim of Law, which will not ſuffer a Choſe in Action, (*in any except the K.*) or a bare Right to be transferred to a Stranger by any Act of the Party whatſoever. Dyer 1. p. 7, 30. p. 208.

But if Donee in T. diſcontinue, and Donor releaſe to the Diſcontinuee, and Donee die, and the Iſſue recover, the Rev'n remains in the Diſcontinuee; for the Iſſue can recover but the Eſtate T. and the Donor in this Caſe, like the Diſs'ee in the former, ſhall not have again what he wholly parted with by his Releaſe.

If Diſs'ee diſſeiſe Diſs'or's Heir, or if a Feme having Right of Dower diſſeiſe the Heir, and he re-enter, yet their former Right remains: So if one diſſeiſe Diſs'or's Heir, and infeoff the Diſs'ee's Heir apparent of full Age, and Diſs'ee die, and then the Diſſeiſor's Heir enter, *&c.* yet the ancient Right of the Heir of the Diſs'ee, *&c.* remains, for in all theſe Caſes the Right is veſted in the Parties by Act of Law.

If a Diſs'ee releaſe to the Diſs'or of his Diſs'or's Heir on Condition, and it be broken; or if he diſſeiſe him, and make a Feoffment on Condition, and enter for a Breach, and then the Heir enter, the Diſs'ee's Right remains in him; but if the Heir had enter'd before the Condition broken, the Diſs'ee's Right had been gone for ever; *for the Heir of the Diſs'or is not ſubject to the Condition, becauſe he claims not under the Conveyance by which it is annex'd; but by re-*

recontinuing his Poſſeſſion wholly defeats all Conveyances made ſince he was diſſeis'd.

The Diſs'or's Heir has the Freehold in Law in him before he enters, and a Fine *ſur Conuſance de droit come ceo*, or *ſur Conuſance de droit tantum*, Surrender by Ten't L. to him in Rev'n, Bargain and Sale by Deed indented and enroll'd, Covenant to ſtand ſeis'd paſs a Freehold in Law before Entry;

(a) Moor Fol. 141. (a) *but a Common Recovery veſts no Freehold, in Deed or in Law, before Entry or Execution ſued.*

If the Ten't in a *Præcipe* ſeis'd in Fee, confeſs himſelf to be a Villein to *A.* and to hold the Land in Villenage of him, by this *A.* is actually ſeis'd without Entry, *for the Poſſeſſion of his Villein is thereby become his Poſſeſſion.*

The Eſtate which makes a Man Ten't to the *Præcipe*, is ſaid to be the Freehold, not the Rev'n, *&c.*

267. *b.* The Releaſe made to the Freeholder ſhall aid him in Rev'n or Rem'r, and the Releaſe made to him in Rev'n or Rem'r ſhall aid the particular Ten't, as much as if it were made to them, but it ſhall not be pleaded by them, being Privies in Eſtate, unleſs they ſhew it.

If two Ten'ts in Common, or ſeveral Ten'ts grant a Rent of 40 *s.* out of their Land, and after the Grantee releaſe to one of 'em, this extinguiſhes but 20 *s.* but if Leſſor L. and Leſſee grant a Rent in Fee, and the Grantee releaſe to one of 'em, this extinguiſhes the whole, for it is but one Rent

Rent iſſuing out of both their Eſtates, but in the other Caſe there are ſeveral Rents.

If there be Lord and Ten't, and the Ten't 268.
be diſſeis'd, and the Lord releaſe to him all his Right in the Seigniory or in the Land, this ſhall extinguiſh the Seigniory, for the Leſſee is Ten't to the Lord in Right and Law; for at Law, if the Diſs'ee's Beaſts had been taken, and he had replevy'd them, he might have compell'd the Lord to have avow'd upon him, or upon the Matter ſhewn, have abated his Avowry, and his Heir of Kt. Service Land ſhould be in Ward or pay Relief; if he die without Heir, the Land ſhall eſcheat. And notwithſtanding the Lord accept Rent of the Diſs'or after the Title of Eſcheat accrued to him, yet it is ſaid that he may have a Writ of Eſcheat, *becauſe Rent may be paid by a Bailiff*, but if he accept of Fealty, *which muſt be done by the Ten't in Perſon*, or avow for the Rent in a Court of Record, he ſhall be barred of his Eſcheat; and if the Diſs'or had made a Feoffment, or had died ſeiſed, and the Land had deſcended to his Heir, before the Diſs'ee had died without Heir, there had been no Eſcheat at all, becauſe the Lord had a Ten't in by Title; and if the Diſs'ee die without Heir, and then the Diſs'or make a Feoffment or die ſeis'd, and the Land deſcend to his Heir, and the Lord accept the Rent of the Heir or Feoffee, he ſhall be barred of his Eſcheat, becauſe they are in by Title.

A Releaſe of a Rent-Charge to Diſs'ee is void, for there is no ſuch Privity between the

the Diſſ'ee and Grantee, as there is in the Caſe above, between the Lord and his Ten't being diſſeiſed, becauſe the Land only is charged.

By 21 *H.* 8. 19. the very Lord may avow as in Lands within his Fee, without naming any Perſon in certain: But he may ſtill avow at Law if he will. And notwithſtanding the Statute, all neceſſary Incidents muſt be obſerv'd, and therefore the Lord muſt alledge Seiſin by the Hands of ſome Ten't in certain within 40 Years. And the Plaintiff ſhall have all the Advantages, that he had before, as Aid, *&c.* Diſclaimer only excepted: For he can't diſclaim to hold of the Lord, becauſe he avows on no Perſon in certain. Tho' the Words of the Act be, if the Lord diſtrain in the Land holden, yet if he come to diſtrain, and the Ten't drive the Beaſts in the Lord's View, out of the Land, and he diſtrain in other Land, yet it is within the Act.

Vide ſupra 247.

If Donee or Leſſee L. be diſſeis'd, a Releaſe by the Donor or Leſſor is good to extinguiſh the Rent, which ſtill continues between them, in reſpect whereof the Donor or Leſſor muſt ſtill avow on the Donee or Leſſee for the Rent behind, but nothing of the Rev'n paſſes, for the Releaſe can't enlarge the Right of the particular Ten't, who at the Time has no Eſtate in the Land.

So if Donee diſcontinue, and then the Donor releaſe to the Donee, he paſſes nothing of the Rev'n, but yet he extinguiſhes the Rent, for the Donor muſt avow on the Donee ſtill, for if he ſhould avow on the

diſcontinuee, the Rev'n would by his own ſhewing appear to be out of him. 269.

If there be very Lord and very Ten't, *i. e.* the Lord have a Fee in the Seigniory, and the Ten't in the Tenancy, and the Ten't make a Feoffment, and the Lord releaſe to the Feoffor before he has accepted the Feoffee for his Ten't, this Releaſe extinguiſhes not the Seigniory, for tho' the Lord may avow on the Feoffor, yet he can't be compell'd to do it, nor is the Feoffor Ten't in Right to the Lord. And if the Feoffee give the Lord Notice, and tender all the Arrears, he ſhall compel him to avow upon him if he avow on any one in certain; he ſhall alſo compel the Lord to avow upon him after the Feoffor's Death, for the Lord can't avow on the Heir of the Feoffor, becauſe nothing deſcended to him, and there never was *any Privity between him and the Lord.* But if the Lord accept the Rent of the Feoffee before the Law compels him, he loſes all the Arrears due in the Time of the Feoffor, for after he ſhall not avow on the Feoffor, nor on the Feoffee, for the Feoffor's Arrearages, *for it may be preſum'd that he would have diſcharg'd the Feoffor, unleſs he paid him all the Arrears.* But if he accept the Rent of the Feoffee due in his Time, after the Feoffor's Death, or of Ten't that has fore-judg'd a Meſne, he ſhall not loſe the Arrears due in the Time of his former Ten't, for the Law compell'd him then to accept 'em for Ten'ts.

A Writ of Cuſtoms and Services lies not againſt a Feoffor, becauſe he is not Ten't in Right

Right to the Lord, and if *the Lord diſtrain for Rent, and* a Reſcous be made, an Aſſiſe lies not againſt the Feoffor and the Reſcuer, for the Feoffee is Ten't, *and the Diſtreſs was taken, and the Violence done to the Lord on Land in his Poſſeſſion, and an Aſſiſe for Rent is not ſo merely Poſſeſſory as an Avowry is; for if the Lord has been ſeis'd of more Rent than of Right is due by Incroachment on the Ten't, he can't recover in Aſſiſe more than is due, but in Avowry he may.* But the Lord's Releaſe to the Feoffor diſcharges all the Arrearages due from him before the Feoffment, *for ſo far as the Feoffor is liable to the Lord's Avowry, ſo far may he take a Releaſe from him;* but ſuch Releaſe can't extinguiſh the Seigniory, as is aforeſaid, for which Cauſe the Feoffee can take no Benefit thereof, *any further than as to the Diſcharge of the Arrrearages during the Feoffor's Time,* but the Feoffor may plead *to the Lord's Avowry* a Releaſe to the Feoffee, for thereby the Seigniory, *which is the Ground* of the Avowry, is extinct. So if a particular Ten't after Waſte done grant over his Eſtate, and he in Rev'n releaſe to the Grantee, the Grantor may plead it *in an Action of Waſte againſt him, for if he in Rev'n ſhould have Judgment againſt him, he would recover the Place waſted againſt the Releaſee.* So the Vouchee, or a Ten't to a *Præcipe* after a Feoffment made, or *an Abbot,* &c. *having aliened* contra formam collationis, may plead a Releaſe to the Ten't of the Land, *for the Demandant can't recover againſt them without avoiding ſuch Releaſe.*

N. B. G.

There be four Kinds of Avowries for Services. 1. *Super Verum Tenentem*, when both Lord and Ten't have Fee. 2. *Super Verum Tenentem in forma prædicta*, when a Leaſe L. or Gift in T. is made, Rem'r in Fee. 3. Upon one as his Ten't by the Manner omitting *Verie*; as when the Lord has a particular Eſtate in the Seigniory, and ſuch Avowry ſhall be made by Donor or Leſſor upon Donee or Leſſee. 4. *Sur le Matter en la Terre*, as within his Fee, and Seigniory; as when Ten't by Kt.'s Service made a Leaſe L. and left an Heir in Ward, the Lord ſhould ſo avow upon the Leſſee.

A Releaſe by a Leſſor to his Leſſee Y. or W. having enter'd by Force of ſuch Leaſe, is good, in reſpect of the Privity between them, for it would be in vain for the Leſſor to make Livery of Seiſin to one already in Poſſeſſion of the ſame Land by his own Leaſe; and if the Leſſee Y. make an Underleaſe for Years, yet may the Leſſor releaſe to the firſt, but not to the 2d Leſſee; and if one make a Leaſe Y. Rem'r for Years, and Leſſor releaſe to him in Rem'r, after the firſt Leſſee has entered, ſuch Releaſe is good to enlarge his Eſtate. 270.

Thus to render good a Releaſe made to one who has not a Freehold in y Land there must be Poſſeſſion & Privity too.

But a Releaſe to Leſſee Y. *in Futuro*, or any Leſſee Y. before Entry; tho' it may extinguiſh the Rent reſerv'd, (*which is a Charge upon the Intereſt into whoſe Hand ſoever it comes,*) yet it can't enure by Way of Enlarging an Eſtate, becauſe the Leſſee has no Poſſeſſion; yet he has ſuch an Intereſt as is grantable over.

And ſince the Statute of Uſes a Releaſe to a Bargainee for a Year, &c. is good, becauſe the Statute executes the Poſſeſſion to the Uſe, and if there be any Reſervation on a Leaſe Y. tho' but of a Pepper-Corn, it is a ſufficient Conſideration to raiſe an Uſe, and conſequently to make the Leſſee capable of a Releaſe.

2 Vent. 35.

If a next Avoidance be granted to two, one may releaſe to the other before the Church becomes void, not after, becauſe it is then as a Choſe in Action.

If one make a Leaſe L. Rem'r L. and Leſſee die, a Releaſe to him in Rem'r before Entry is good, for he has a Freehold in Law.

The Leſſor's Releaſe to a Ten't by Sufferance is void, for he has a Poſſeſſion without a Privity. But if one enter of his own Wrong, and take the Profits, his Words to hold at the Owner's Will can't qualify the Wrong, for he is Diſs'or, and the Owner's Releaſe to him is good; or if the Owner conſented, he is Ten't W. and then the Releaſe is alſo good. Note, *That tho' it be generally true, that he who enters wrongfully and takes the Profits is a Diſs'or, yet this is to be underſtood where there is no particular Eſtate in the Land; but if there be a Term* in Eſſe, *and one enter claiming the Term, and pay the Rent*, &c. *he ſhall not be a Diſs'or, but an Action of Debt or Waſte ſhall lie againſt him, and one may be an Executor of his own Wrong of a Term.*

3 Lev. 35.

There

There are four Kinds of Privies. 1. In Eſtate; as the particular Ten't, and he in Rev'n or Rem'r. 2. In Blood; as Heir to the Anceſtor. 3. By Repreſentation; as Executor to the Teſtator. 4. In Tenure; as Lord and Ten't. 271.

Before 27 *H.* 8. 10. If a Man had made a Feoffment to the Uſe of his Will, and afterwards the Feoffee had releas'd to the Feoffor and his Heirs, this Releaſe was good; for in ſuch Caſe the Law intends that the Feoffor ought preſently to occupy the Land at the Will of the Feoffee, and ſo the Law makes a Privity between them. And the Feoffor ſhould be ſworn on a Jury by Common Law; and where 2 *H.* 5. 3. required 40 *s. per Annum* in a Juror, it was holden that *ceſtuyque* Uſe of Land to that Value might be returned; as to a Feoffment to the Uſe of a Will. *Vide ſupra* 166.

An Uſe is a Truſt or Confidence repos'd in ſome other, which is not iſſuing out of Land, but as a Thing collateral, annex'd in Privity to the Eſtate of the Land, and to the Perſon touching the Land, *viz.* that *ceſtuyque* Uſe ſhall take the Profits, and the Ter-tenant ſhall make an Eſtate according to his Direction; ſo that *ceſtuyque* Uſe has neither *jus in re*, nor *ad rem*, nor any Remedy but in a Court of Equity. 272.

An Uſe is either rais'd by Tranſmutation of the Eſtate, as by Fine, Feoffment, *&c.* or out of the Eſtate of the Owner of the Land, as by Bargain and Sale, Covenant to ſtand ſeis'd, *&c.* A Feoffee to the Uſe of *A.* and his Heirs before 27 *H.* 8. bargains and Co. L. 271. b.

ſells to *C.* without giving Notice of the Uſe; nothing paſſes, becauſe he was ſeis'd to the Uſe of *B.* before, which Uſe can't be alter'd or extinguiſhed without Tranſmutation of the Poſſeſſion, and there can't be two Uſes of the ſame Land *in Eſſe* at the ſame Time. *A.* diſſeiſes one to *B.*'s Uſe, *B. not knowing thereof*, and bargains and ſells to *C. C.* has an Uſe executed by the Statute, *which ſhall not be deveſted by* B.*'s agreeing afterwards to the Diſſ'in, for tho' an Agreement ſubſequent be look'd upon as equivalent to a Command precedent, yet the Law will not by ſuch a Fiction take from* C. *an Uſe for good Conſideration ſettled in him.*

Releaſes either enure, 1*ſt*, By Way of enlarging an Eſtate; or, 2*dly*, By Way of *Mitter le* Eſtate; or, 3*dly*, By Way of *Mitter le Droit*; or, 4*thly*, By Way of Extinguiſhment.

273. As to the firſt, it is neceſſary that the Parties to them be privy in Eſtate, therefore if a Donee or Leſſee make an Under-leaſe, a Releaſe by the Donor or firſt Leſſor to the ſecond Leſſee is void, but a Leſſor L. or Y. may releaſe to the Husband of his Leſſee and his Heirs, *&c.* And if one make a Leaſe Y. Rem'r L. and then releaſe to the Leſſee Y. and his Heirs, he thereby enlarges his Eſtate in Fee.

If a Leſſor Y. releaſe to his Leſſee, or to a Tent't by Execution, all his Right without ſaying any more, the Leſſee has an Eſtate *I.* if he releaſe to him and his Heirs, he has a Fee, *&c.* for ſuch Releaſe

Releaſe is in this reſpect like Livery of Seiſin, which being made without Words of Inheritance, gives but a State L.

If a Leſſor releaſe to his Leſſee *pur autre Vie*, he gives him an Eſtate for his own Life.

If one make a Leaſe for 10 Years, Rem'r for 20 Years, and he in Rem'r releaſe to the firſt Leſſee, the Releaſee ſhall have 30 Years; for his Term of 10 Years ſhall not be drown'd, becauſe a Chattel can't be drown'd in a Chattel.

If I grant the Rev'n of my Ten't L. to another for L. I can't have Waſte; but if I after Releaſe to my Grantee and his Heirs, he ſhall have Waſte for Waſte done after ſuch Grant of the Inheritance to him.

But where a Releaſe enlarges an Eſtate, the Releaſee muſt not only be privy but muſt alſo have an Eſtate; therefore if an Infant's Leſſee L. grant over his Eſtate, and the Infant at full Age bring a *Dum fuit infra ætatem* againſt the Grantee, who vouches the Grantor, a Releaſe by the Demandant to the Grantor and his Heirs, is void as to enlarge his Eſtate, *for it is manifeſt that the Releaſe can't enlarge the Eſtate of him that has no Eſtate.*

2. Releaſes that enure by Way of *Mitter* the Eſtate muſt be alſo between Privies, *viz.* Parceners or Jointenants; but ſuch a Releaſe does not require any Words of Inheritance, whether it make a Degree, as when it is made by one Parcener to another, or one Jointenant to one of his Companions, or

whether it make no Degree, as when it is made by one Jointenant to all the reſt.

If there be two Parceners of a Rent, and one of them marry the Ter-tenant, and the other releaſe to her, this ſhall enure by Way of *Mitter le* Eſtate, and yet the Rent was ſuſpended at the Time of the Releaſe; but if ſhe had releaſed to the Husband, it would have enured by Way of Extinguiſhment. *Quare*, how a Releaſe to both Husband and Wife ſhall enure.

3. Some Releaſes enure by Way of *Mitter le Droit*, which transfer the Right of the Releaſor to the Releaſee; as when Diſs'ee releaſes to Diſs'or, which makes his Eſtate rightful which was wrongful before.

Such a Releaſe may be on Condition, but a Condition can't be releas'd on Condition; nor can a Villein be manumitted, or a Grant attorn'd to on Condition ſubſequent, but a Condition precedent is good in both Caſes, *for there is no Attornment or Manumiſſion before it is perform'd.*

K. may make a Denizen, or grant a Pardon on Condition either precedent or ſubſequent.

274. A Releaſe of a bare Right for a Day, or an Hour, *&c.* is as good as if it were made to the other and his Heirs, *&c.* for a Diſs'ee cannot releaſe Part of his Eſtate in the Right, *becauſe he has no Right to any Eſtate but that whereof he was diſſeiſed, therefore he muſt releaſe his Right to that or none at all.*

Neither

Neither is it requiſite that there be any Privity between the Parties to ſuch Releaſe; as when Leſſee L. makes a Leaſe L. Rem'r in Fee, and the firſt Leſſor releaſes to the 2d Leſſee, this abſolutely bars the Releaſor, and the Rem'r Man ſhall take Benefit of it; and if a Diſs'or make a Leaſe L. Rem'r in Fee, or a Leaſe L. only, and the Diſs'ee releaſe to the Leſſee L. it ſhall enure to the Benefit of him in Rem'r or Rev'n, and ſuch Releaſes are ſaid to enure partly by Way of *Mitter le droit*, and partly by Way of Extinguiſhment. 275.

But he in Rev'n or Rem'r ſhall take no Benefit of a Releaſe of all Actions to Leſſee L.

Neither is Privity requiſite in Releaſes which enure by *Mitter le Droit*, only which are ſaid to enure by Way of Entry and Feoffment; as if one be ouſted by two Diſſeiſors, Abators, or Intruders, and releaſe to one of them; or if a Donee in T. or Leſſee L. be diſſeiſed by two, and afterwards he and the Reverſioner releaſe to one of them, the Releaſee ſhall hold the other out in ſuch Manner, as if the Diſs'ee, *&c.* had entered and infeoff'd him: But if Leſſee alone make a Releaſe to one of them, it ſhall enure to them both; for if it ſhould enure by Way of Entry and Feoffment, the Releaſee's Fee-ſimple would be chang'd to a Fee qualified in the firſt Caſe, and an Eſtate L. in the ſecond, and the Rev'n would be reveſted in the Donor or Leſſor, *who were Strangers to the Releaſe*, which 276.

ſtrange Tranſmutation of Eſtates the Law will not ſuffer.

But if K.'s Leſſee L. be diſſeiſed by two, and releaſe to one of them, the Releaſee ſhall hold the other out, for the Diſs'ors gain'd but a State for Life. So if two Jointenants make a Leaſe L. and after diſſeiſe the Leſſee, who releaſes to one, he ſhall hold the other out, becauſe the Diſs'in was but of a State L. *and the Releaſe enuring by Way of Entry and Feoffment, does not diminiſh the Eſtate of the Releaſee, nor reveſt an Eſtate in any not concerned therein, but only deveſts the Eſtate which the other Jointenant gain'd by Diſs'in.*

If Leſſee Y. be ouſted, and Leſſor diſſeiſed, and Leſſee releaſe, the Diſs'ee may enter, but if Leſſee L. be diſſeiſed, and releaſe to the Diſs'or, the Leſſor can't enter, for the Diſs'or has a Freehold whereon the Releaſe of Leſſee L. may enure, but he has no Term for Y. *&c. And it is plain in the firſt Caſe that the Leſſor might recover in Aſſiſe before the Releaſe, tho' he could not take the Profits, and after the Releaſe he may both recover and take the Profits, for the Eſtate gained by the Diſs'in being wholly defeated, if the Diſs'or ſhould maintain an Action againſt him for the Profits, it muſt be grounded in the Releaſe of the bare and naked Right of the Leſſee Y. which can't be transferred; but in the 2d Caſe Leſſor can't have an Aſſiſe during the Life of Leſſee L.*

If

If two Jointenants be diſſeiſed by two, and one of them releaſe to one of the Diſs'ors, he ſhall not hold out his Companion, *for if this ſhould enure by Way of Entry and Feoffment, it would not only deveſt the Eſtate of the other Diſs'or, but reveſt the Eſtate in the other Diſs'ee who was a Stranger to the Releaſe.*

Two Femes diſſeiſe a Man, and one of them marries, and the Diſs'ee releaſes to the Husband, this enures to the Advantage of both Diſs'ors, for the Husband is in a Manner in by Title, *and it would be a hard Conſtruction to make ſuch a Releaſe enure to ouſt his Wife, in Right of whoſe Eſtate alone he was enabled to take the Releaſe*; but if two Women be Diſs'ors, and one take Husband, and Diſs'ee releaſe to the other, ſhe becomes ſole ſeiſed. Co. L. 278. a.

If two Diſs'ors make a Leaſe L. or Y. a Releaſe to one of them enures to both, *for if it ſhould enure by Way of Entry and Feoffment, the Releaſee would avoid his own Leaſe.* Mortgagee on Condition after Condition broken is diſſeiſed by two, and Mortgagor releaſes to one of them, this enures to both, for they did no Wrong to the Mortgagor, and he releaſes not a Right to an ancient Eſtate deveſted by Wrong, but a Title *of Re-entry by Force of a Condition which ſhall not by Conſtruction of Law defeat the Eſtate to which it was annexed, without an expreſs Re-entry, according to the Words of the Condition.*

A Releaſe to one joint Feoffee enures to him and all his Companions in Reſpect of the Warranty, which the Law preſumes that they have, *and which, if the Releaſe ſhould enure by Way of Entry and Feoffment, would be defeated, the Eſtate being defeated to which it was annexed.*

If he in Rem'r L. diſſeiſe Ten't L. and then Ten't L. die, the Diſs'in is purged, and he becomes Ten't L. for the Law more reſpects a leſſer Eſtate by Right, than a larger Eſtate by Wrong.

Vide Co. L. 42. b.

If Diſs'ee, or he whoſe Rev'n or Rem'r is deveſted by a Forfeiture, releaſe to the Ten't of the Land, whether he be in by Feoffment or Diſs'in, ſuch Releaſe, if the Releaſor had Right of Entry, defeats all meſne Titles, becauſe it enures by Way of Entry and Feoffment. Therefore if *B.*'s Diſs'or infeoff *C.* with Warranty, who infeoffs *D.* with Warranty, who is diſſeiſed by *E.* *B.*'s Releaſe to *E.* defeats all the mean Eſtates and Warranties, for it is made to a Diſs'or, *who comes not to the Land in Privity of the Eſtate to which the Warranty was annexed, and all the Right of* C. *and* D. *to the ſaid Eſtate being wholly defeated by the Releaſe of* B. *their Re entry can't recontinue their former Poſſeſſion, but they muſt be Diſs'ors anew.*

277. So if a Diſs'or's Leſſee L. alien in Fee, and then the Diſs'ee releaſe to the Alienee, the Diſs'or can't enter for the Forfeiture. And if a Diſs'or die ſeis'd, the Diſs'ee being within Age, and a Stranger abate, and Diſs'ee being of full Age releaſe to the Abator

Abator, the Heir of the Diſs'or ſhall never enter.

But if Leſſee L. be diſſeiſed, and the Diſs'or be diſſeiſed, and he in Rev'n releaſe to the 2d Diſs'or, the firſt may enter on him, and if Leſſee enter, he leaves the Rev'n in the firſt Diſs'or; for the Entry of him in Rev'n was not lawful, *and conſequently his Releaſe cannot enure by Way of Entry and Feoffment, therefore the Eſtate of the Releaſee being defeated by a mean Title, the Right of Poſſeſſion draws the naked Right along with it.* Vide ſupra 354.

Notwithſtanding a Releaſe by one whoſe Entry is lawful enures to many Purpoſes by Way of Entry and Feoffment, and therefore if a Diſſeiſor's Feoffee on Condition make a Feoffment, without expreſſing any Condition; or if a joint Diſs'or grant a Rent, and the Diſs'ee releaſe to the 2d Feoffee, or the other joint Diſs'or, the Condition or Rent are avoided, becauſe the firſt was not expreſſed on the Feoffment, and the 2d was not granted by the Releaſee. And ſuch a Releaſe takes away all wrongful Titles; as if *A.* diſſeiſe *B.* to *C.*'s Uſe, and *B.* releaſe to *A.* this takes away *C.*'s Agreement to the Diſs'in. Yet if a Diſs'or make a Feoffment on Condition, and Diſs'ee releaſe to the Feoffee; or if he grant a Rent, and then Diſs'ee releaſe to him; ſuch Condition or Rent remains, for one ſhall not avoid them againſt his own expreſs Acceptance or Grant by Force of ſuch a Releaſe, (and yet if the Diſs'ee had entered Vide ſupra 363. 278.

entered, and made a Feoffment to him, they had been avoided.) +If two Diſs'ors make a Feoffment, and take back an Eſtate L. or T. a Releaſe to one enures to both; or if two Diſs'ors be diſſeiſed, and releaſe to their Diſs'or, and then diſſeiſe him, and Diſs'ee releaſe to one or both, yet the 2d Diſs'or may enter, for the Law will not make ſuch a Conſtruction of ſuch a Releaſe, as to enable a Man thereby to avoid his own *Feoffment* or Releaſe; and if the Heir of a Diſs'or endow his Wife, *ex aſſenſu Patris*, and then the Diſs'ee releaſe to the Diſs'or, he ſhall not avoid the Endowment.

+ because their Estate ings't Lord is by Feoffm.

Thus notwithstanding the implication of Law to ye purpose, the Releaſe by Diſſeiſee is far from operating in many respects as any there had been any actual Entry by Feoffm.

Neither ſhall Acts done to the Diſs'or be avoided by the Releaſe of the Diſs'ee; as if the Lord confirm his Eſtate to hold by leſſer Services, or if Eſtovers be granted to him to be burnt in his Houſe, or a Warranty be made to him, they ſhall not be loſt by ſuch Releaſe.

An Alien diſſeiſes *J. S.* and is made a Denizen, and then *J. S.* releaſes to him, K. ſhall not have the Land, for it is as it were a new Purchaſe; but if the Alien had been a Feoffee, K. ſhould have Land, *for it is intended that the Feoffee has a Warranty, by Force of which he may preſerve his Eſtate or recover in Value if he loſe it, which I ſuppoſe K. may take Advantage of, as being annexed to the Eſtate (tho he can't claim a (a) mere Right of a real Action as forfeited to him,) and K ſhall not loſe his Poſſibility by ſuch a Releaſe, but the Diſs'or is merely in by Wrong.*

(a) 3 Rep. 2. b.

The

The Lord diſſeiſes his Ten't, and is diſſeiſed, and the Diſs'ee releaſes to the 2d Diſs'or, the Seigniory is not revived, for the Diſs'or claims under the Lord *the ſame Eſtate which* was in the Lord, and the Poſſeſſion was never actually removed; and the Law is the ſame if the Lord had been diſſeiſed by two, and the Diſs'ee had releaſed to one of them. But if the Lord and a Stranger diſſeiſe the Tenant, and the Tenant releaſe to the Stranger, the Seigniory is revived, for the Stranger claims not under the Lord, and if the Stranger had ſurvived the Lord, the Seigniory, would have been revived.

An Infant Diſs'or aliens in Fee, the Alienee dies ſeiſed, the Diſs'ee releaſes to the Heir of the Alienee, the Entry of the Infant is ſtill lawful, yet if he bring a Writ of Right againſt the Heir of the Alienee, and the *Miſe* be joined on the mere Right, the Heir ought to have a Verdict, for the Right of the Diſs'ee paſſed to him by the Releaſe; and tho' a Releaſe by him whoſe Entry is not lawful is ſaid to enure by Way of Extinguiſhment, yet the Releaſee may take Advantage of it, for if he be ſeiſed of the Land in Fee, the whole paſſes to him, and if he be Ten't L. only, he ſhall have the Benefit of it during his Life, tho' the whole paſs not to him; but in all ſuch Caſes the Right of him, that made the Releaſe, is wholly extinguiſhed as to himſelf. 279.

Ten't in T. with the Rem'r in Fee to *A.* dies without Iſſue, *B.* intrudes, *A.* recovers

vers in Formedon by Default, and makes a Feoffment to *C. B.* reverſes the Recovery in a Writ of Deceit, *C.* ſhall never have a Writ of Right, *for the Recovery being reverſed, all Eſtates ſubſequent to it are defeated, and B. is reſtored to the Land in ſuch Plight as if there had been no recovery at all, and the Feoffee cannot maintain an Action on the naked Right of his Feoffor.*

280. 4. Some Releaſes enure by Way of Extinguiſhment as to the Releaſor only, and as to others by Way of *Mitter le droit*; as where one, whoſe Entry is not lawful, releaſes to the Tenant, or a Diſs'ee releaſes to a Leſſee L. or a joint Feoffee of a Diſs'or: But where the Releaſee cannot have the Thing releaſed, a Releaſe ſhall enure by Way of Extinguiſhment againſt all Manner of Perſons; as when the Lord releaſes his Seigniory to his Tenant of the Land, or when the Grantee of a Rent-Charge or Common releaſes to the Tenant.

Such Releaſes abſolutely extinguiſh the Rent, *&c.* tho' the Releaſee be but Tenant for L. And they may be made to one whoſe Eſtate is ſuſpended; as if a Feme Meſne marry her Tenant, and the Lord releaſe to the Feme, the Seigniory is extinct; but if he releaſe to the Husband, both the Seigniory and Meſnalty are extinct.

11 Co. L. 305. b. 152. b. If the Lord releaſe all his Right in the Seigniory, or all his Right in the Land, the Seigniory is extinct without any Words of Inheritance.

But

But the Lord may releaſe his Seigniory n T. or for L. or Y. *& ſic de cæteris*; but a bare Right cannot be ſo releaſed, for if it be releaſed for an Hour it is gone for ever. Vide ſupra 366.

If the Tenancy be given to the Lord and Stranger, and the Heirs of the Stranger, he Lord releaſes all his Right to his Companion; this not only paſſes his Eſtate in he Tenancy, but alſo extinguiſhes his Right in the Seigniory.

The Lord grants his Seigniory for Years, he Tenant attorns, the Lord releaſes to he Grantee Y. and to the Tenant of the Land generally, this extinguiſhes the Seigniory, and the State of Grantee Y. alſo; for as to the Tenant of the Land it enures by Way of Extinguiſhment of the Seigniory, which requires no Words of Inheritance, but the Eſtate of the Grantee Y. in he Seigniory can be enlarged but for L. without apt Words of Inheritance, and herefore it ſhall be extinct, becauſe there cannot remain a particular Eſtate in the Seigniory, the Fee being extinct; *for the Seigniory Paramount of an Eſtate in Fee cannot iſſue out of and be ſupported by a Meſnalty of a ſmaller Eſtate.* 9 Rep. 134 b.

But if the Releaſe had been to them, and heir Heirs, it had given the Grantee a Fee in one Moiety, and extinguiſhed the other.

Littleton proves that in the Caſe aforeſaid he grand Aſſiſe ought to paſs for the Heir of the Alienee, from the Caſe of him that had a Rem'r in Fee expectant on a State L. at Common Law; for before *Weſtm.* 2. 3. If Tenant

Tenant L. had loſt by Default in a feigned Action, and died, he in Rem'r had no Remedy. But if he had diſſeiſed Ten't L. before ſuch Recovery, and then Ten't L. had re-entered, and loſt by Default, he might have had a Writ of Right againſt the Recoverer, for tho' the Seiſin which he gained was defeated by the Re-entry of the Tenant L. as to Ten't L. yet it was a good Ground of a Writ of Right againſt the Recoverer, who was a Stranger. And tho' the
281. *Miſe* be joined in this Manner, whether the Tenant have more Right as he holds, than the Demandant in the Manner as he demands, and the Seiſin of the Demandant were defeated, ſo that he has no Right in the Manner as he demands, yet he ought to recover; for theſe Words *modo & formâ* are mere Form, when the Iſſue is joined, on the Point of the Action as in this Caſe, or when a Demandant in *Caſu Proviſo* counts of an Alienation in Fee, and the Tenant ſays that he did not alien *Modo & Formâ, &c.* and the Jury finds an Alienation in Tail, *for the Point of the Writ is whether the Ten't in Dower aliened to the Diſheriſon of the Demandant.*

But when the Iſſue is on a collateral Point, *Modo & Formâ* are material; as when a Feoffment is alledged by two, or by Deed, the Jury cannot find a Feoffment by one, or without Deed, *for perhaps the other might be induced to join Iſſue on the Conveyance alledged, becauſe he knew that there was none ſuch.*

If

If Land be let to *A.* for I. Rem'r to B. or L. Rem'r to *A.*'s Heirs, *A.* dies, *B.* enters and dies, a Stranger intrudes, *A.*'s Heir ſhall have a Writ of Right of *A.*'s Seiſin as Tenant L. *A.* and *B.* are Jointenants L. Rem'r to *A.*'s Heirs, *A.* dies, *B.* dies, *A.*'s Heir ſhall have a Writ of Right of *A.*'s Seiſin. Donee in T. dies without Iſſue, Rem'r Man enters, Donee's Wife has a Child who enters, and dies without Iſſue, Rem'r Man ſhall have a Writ of Right of the Seiſin which he had. So if Land be given to *A.* in T. Rem'r to him in Fee, he dies without Iſſue, his collateral Heir ſhall have a Writ of Right, tho' the Fee were not executed. Vide ſupra 269.

Tho' the Iſſue be on a collateral Point, yet if by finding of Part of it it ſhall appear to the Court that the Plaintiff had no Cauſe of ſuch Action, *modo & formâ* are but Form; as if in Treſpaſs the Defendant plead that Plaintiff holds of him by Fealty and Rent, and that for Rent he diſtrained; and the other deny that he holds of him *modo & formâ*, and the Jury find that he holds of him by Fealty only, the Writ ſhall abate; for let the Tenure be of what Nature ſoever, the Tenant cannot have Treſpaſs a- Marlbr. 3. gainſt his Lord.

If the Matter of the Iſſue be found, it is ſufficient; as when on an Indictment of Murder the Defendant is found guilty of Manſlaughter, for the Killing is the Subſtance. So in Aſſiſe of Darrein Preſentment, if the Plaintiff alledge the Avoidance by Privation, and the Jury find it by Death; or in Aſſiſe by the Guardian of a Hoſpital againſt 282.

againſt the Ordinary, if he plead that h deprived him in his Viſitation as Ordinar whereon they are at Iſſue, and it be foun that he deprived him as Patron; or in Deb on a Bond to perform a Covenant of no cutting down Trees, if a Breach be aſſigne in cutting 20, and the Jury find 10, it i ſufficient.

Alſo in a Writ of Treſpaſs for Good carried away, or Battery, or falſe Impriſon ment, if the Defendant plead that he is no guilty in the Manner as the Plaintiff ſup poſes, and it be found that he is guilty a another Day, or in another Town or Coun ty than the Plaintiff ſuppoſes, yet he ſhall recover; for in tranſitory Actions the De fendant ſhall not traverſe the County o Town where the Fact is laid, without ſome ſpecial Cauſe of Juſtification, which is ſo local that it cannot be alledged in anothe Place; as where a Conſtable of a Town in another County arreſts a Man for a Breach of the Peace; in which Caſe, if an Action be brought againſt him, he ſhall traverſe the County, and all other Places, ſaving the Town whereof he is Conſtable; ſo where the Defendant juſtifies for Damage-Feaſant In an Action of Slander laid in *London*, the Defendant pleaded a Concord for Words in all other Counties except *London*, and tra verſes the Speaking there; the Plaintiff de nied the Concord, the Defendant demurred, and the Plaintiff had Judgment: For in this Caſe the Court allowed a Traverſe on a Traverſe, leſt by ſuch an Invention this an tient Principle ſhould be ſubverted, that

the

e Place where a tranſitory Action is laid
all not be traverſable.

In Treſpaſs, if the Fact were not commit- 283.
d, the Defendant ought to plead Not
uilty; but if the Fact were committed, and
e have Cauſe of Juſtification and Excuſe,
e muſt confeſs the Fact, and plead the ſpe-
al Matter; but if he plead Not guilty, he
nnot give the ſpecial Matter in Evidence;
na the End of the Law in requiring ſuch
xactneſs in Pleadings, (which, being drawn
Men learned in the Law, it is to be pre-
med will not be miſtaken,) is that the Mat-
r, which is truly in Queſtion between the
arties, ſhould only be put in Iſſue, for o-
herwiſe a Cauſe might be loſt by the Party's
ot being able to prove that in Court, which
t of Court is known to all the World, and both
arties will be put to an unneceſſary Charge:
herefore in Treſpaſs, *quare Clauſum, &c.* on
Not guilty pleaded the Defendant can't give
n Evidence, that they came through the
laintiff's Hedge which he ought to keep
n Repair. In Detinue, the Defendant on
Non detinet pleaded, cannot give in Evidence
hat the Goods were pawned for Money yet
npaid, but he may give in Evidence a Gift
om the Plaintiff, for that proves that he
etains not the Plaintiff's Goods. In Waſte,
n *null Waſt* pleaded, he may give in Evi-
ence Lightning, Enemies, *&c.* but not juſti-
iable Waſte, as that he cut down Trees to
epair the Houſe, *&c.* If two be jointly
ound, and one be ſued alone, he may plead
his in Abatement, but cannot plead *non eſt*
actum. If an Executor plead *Plenement adminiſter*

miniſter, and *iſſint riens inter mains*, if it be prov'd that he has Goods in his Hand which were the Teſtator's, he may give in Evidence that he has paid to the Value of his own Money, for thereby the Goods which he had as Executor become his own proper Goods. In an Aſſiſe, the Tenant on *Null tort null Diſſeiſin* pleaded can't give in Evidence a Releaſe after the Diſſeiſin, but a Releaſe before he may, for he could not diſſeiſe him whoſe Right he had by the Releaſe. Collateral Warranty can't be given in Evidence, when the *Miſe* is join'd on the mere Right.

Where a Man can't take Advantage of the ſpecial Matter in Pleading, he ſhall give it in Evidence; therefore becauſe one can't juſtify Killing, he ſhall give in Evidence that it was *ſe defendendo*, or in Defence of his Houſe againſt Thieves, *&c.*

By 7 *J.* 1. 5. In Actions on the Caſe, Treſpaſs, Battery, or falſe Impriſonment againſt a Juſtice of Peace, Mayor, or Bailiff of a Corporation, High or Petty Conſtable, for any Thing done in their Offices they ſhall plead Not guilty, and give in Evidence the ſpecial Matter; *So by* 21 J. 1. 4. *may the Defendant in an Information on Penal Statutes, except Recuſancy and Champerty, and generally in late Statutes there is a Clauſe, that where a Man is ſued for executing the Powers contained in them, he may plead Not guilty, and give the Special Matter in Evidence.*

If Diſs'ee enter on Diſs'or's Heir, and the Heir bring an Aſſiſe he ſhall recover; but if he

bring a Writ of Right he ſhall be barr'd; d if he recover in Aſſiſe againſt the Diſs'ee, t the Diſs'ee may have a Writ of Entry *en per* againſt him, and recover.

A. dies ſeis'd, the Land deſcends to *B. C.* ates and dies ſeis'd, *B.* enters, *C.*'s Heir, re- vers in Aſſiſe againſt *B. B.* may have *Mort- ceſtor* againſt *C.*'s Heir; and if *A.* had been ſeiſed, *B.* as Heir to him ſhould have had Writ of Entry *en le per.*

Tho' the Vouchee having enter'd into 284. arranty, or a Ten't to a *Præcipe* having a- ned the Land, may take a Releaſe from e Demandant; yet if a collateral Anceſtor the Demandant releaſe to them with War- nty, they can't plead this againſt the De- ndant; for the Releaſe by a Stranger is id, becauſe they are Ten'ts in Law only to the anſwering the Action of the De- ndant, but not as to other Purpoſes.

A Releaſe of Actions real is a good Bar Actions mix'd; as Aſſiſe of *Novel Diſs'in,* ſte, *Quare Impedit,* (*a*) Annuity, and ſo (*a*) Contra Sir *W. Jones* a Releaſe of Actions perſonal. 215.

Actio eſt jus proſequendi quod ſibi debetur in 285. *dicio,* or *Action n'eſt auter choſe que loyal de- nd de ſon droit.*

By a Releaſe of Actions, Cauſes of Actions releas'd; but in Submiſſion of all Actions Arbitrament, Cauſes of Actions are not ntained; *becauſe nothing ſhall be intended e referr'd to Arbitration, but Matters then Controverſy between them.*

A Man can't by his own Act alter the ture of his Action; as if Leſſee do Waſte, d then ſurrender to his Leſſor, or the Leſ- ſor

ſor releaſe to him all Actions real, the Leſſor can't have an Action of Waſte for the Damages only: Yet after a Term for Years is expired, or a Leaſe *pur autre vie* is determined by the Death of *ceſtuyque vie* Leſſor may have an Action of Waſte for the Damages only.

When Part of an Action determines by Act of God, and the like Action lies for the Reſidue, the Writ ſhall not abate; as Waſte and Ejectment, becauſe they lie for Damages only, ſhall proceed, tho' the Leaſe determine hanging the Action; but a Writ of Waſte ſhall abate, if the Inheritance determine hanging the Action; for the Diſherison of the Plaintiff is the Ground of the Action: So if Ten't *pur autre vie* bring an Aſſiſe, and hanging the Action *ceſtuyque vie* die, the Writ ſhall abate, for an Aſſiſe lies not for Damages only: So if a Writ of Annuity be brought, and hanging the Action, the Annuity determine, the Writ ſhall abate, becauſe it lies not for the Arrearages only: But if a Writ of Conſpiracy be brought againſt two, and one of them die, it ſhall not abate, (notwithſtanding the like Action lies not againſt the Survivor,) *becauſe the* Tort, *which is the Ground of the Action, is not leſſened by the Death of one of the Defendants.* In an Aſſiſe by two, a Releaſe of Actions perſonal made by one of them, bars himſelf only, becauſe ſuch Action is partly Real; *E. omne majus trahit ad ſe minus.*

In real Actions, wherein Damages are not recoverable at Law, as *Mortanceſtor*,

Dower, Entry *ſur Diſs'in, &c.* a Releaſe of Actions perſonal is no Bar; *becauſe the Demandant may wave the Benefit of the Statutes, and bring his Action at Law for the Land only.* Co. L. 100. 1 Lev. 38.

If an Aſſiſe of *Novel Diſs'in* be arraign'd againſt the Diſs'or and Ten't, the Diſs'or may plead a Releaſe of Actions perſonal, but not of real, for none can plead ſuch a Releaſe in an Aſſiſe but the Ten't. And the Ten't in Aſſiſe may plead a Releaſe of Actions perſonal to the Diſs'or, *becauſe the Diſs'ee can't recover the Land in an Aſſiſe againſt the Ten't, without recovering Damages againſt the Diſs'or.* But he can't plead a Releaſe of Actions real made to the Diſs'or, *becauſe the Aſſiſe is meerly perſonal as to him.*

He in Rem'r ſhall not after the Death of Ten't L. plead a Releaſe of Actions made to the Ten't L. neither ſhall the ſurviving Feoffee of the Heir of the Diſs'or plead ſuch a Releaſe made to his Companion; nor ſhall the Diſs'or plead ſuch a Releaſe made by the Diſs'ee againſt his Heir.

He that has Right of Entry may enter tho' he have releas'd all Actions: So if one take my Goods or detain them, I may take them out of his Poſſeſſion, tho' I have releas'd all Actions. 286.

Detinue lies where one comes to Goods by Delivery or Finding: In this Action the Thing detain'd is to be recovered, therefore it muſt be ſo certain that it may be known; for which Cauſe Detinue lies not for Money out of a Bag, *&c.* But for Charters of the Inheri-

Inheritance it does, if you know the Certainty of 'em, and what Land they concern, or if they be in a Bag ſealed, *&c.* tho' you know not the Certainty of 'em. If you declare of one in Special, the Defendant ſhall not wage his Law, becauſe it concerns the Realty; and for the ſame Cauſe Summons and Severance lies in ſuch an Action. A *Capias* lies in Detinue of Goods, but not in Detinue of Charters in Special, yet a Releaſe of Actions perſonal is a good Bar.

287. The Statute which before the 27 *H.* 8. 10. enabled a Diſſ'ee to bring a real Action againſt the Diſſ'or, being Pernor of the Profits, after a Feoffment made by him, enabled the Diſſ'or by Conſequence to take from him a Releaſe of Actions real, and yet he had neither *jus in re*, nor *ad rem*, and he ſhould have Benefit of ſuch Releaſe by ſpecial Pleading, and bar the Diſſ'ee; and the Diſſ'ee might enter, becauſe the Ten't acknowledg'd himſelf a Diſſ'or. In Dower the Ten't pleads that *A.* was ſeiſed before the Writ purchas'd till he was by the Ten't diſſeiſed, and that hanging the Writ *A.* recovered; this is a good Plea in Abatement, and yet the Ten't acknowledges a Diſſ'in in himſelf.

4 H. 4. 7.

A Releaſe of all Actions real and perſonal, is no Bar in an Appeal of Death, or Robbery; for ſuch a Releaſe bars only civil Actions, not criminal; becauſe an Appeal, in which the Appellee ſhall have Judgment of Death, is not properly a perſonal Action, but a Releaſe of all Actions, or Appeals, is

288. a good Bar: And a Releaſe of Actions perſonal is a good Bar of an Appeal of *Mayhem*.

A Releaſe of Actions perſonal is no Bar in a Writ of Error to reverſe an Outlawry by Proceſs on the Original, becauſe by ſuch Writ the Plaintiff ſhall only be reſtor'd to his Goods, *&c.* againſt the K. but ſhall recover, or be reſtored to, or diſcharged of nothing againſt the Party, therefore it is not properly an Action: But ſuch a Releaſe bars Error to reverſe a Judgment and Outlawry after it; it likewiſe bars an Attaint and *Audita Querela.* And a Releaſe of the Writ of Error is a Bar even in the firſt Caſe, for tho the Plaintiff recover, or be reſtored to nothing by it againſt the Party, yet the Defendant is privy to the Record, and liable to Vexation by the Writ of Error.

Judgment of Outlawry is given by the Coroners in the County in all Places but *London*, where the Mayor by Cuſtom is Coroner, and Judgment of Outlawry given by the Recorder. Outlawry forfeits no Goods, neither does it diſable, nor does Error lie upon it, till it appear of Record, either by the Return of the Exigent, or Removal of the Outlawry by *Certiorari.* Vide ſupra 193.

The Ten't releaſes to the Demandant after Recovery, all his Right, *&c.* He can't have Error, for he can't be reſtored to the Land. 289.

If one recover Debt or Damages, and releaſe all Actions, yet may he ſue Execution by *Capias ad Satisfaciendum*, *Elegit* or *Fieri Facias. Note*; Two old Records, wherein an infirm old Man found guilty in an Action of Treſpaſs, and a Woman big with

Inheritance it does, if you know the Certainty of 'em, and what Land they concern, or if they be in a Bag ſealed, *&c.* tho' you know not the Certainty of 'em. If you declare of one in Special, the Defendant ſhall not wage his Law, becauſe it concerns the Realty; and for the ſame Cauſe Summons and Severance lies in ſuch an Action. A *Capias* lies in Detinue of Goods, but not in Detinue of Charters in Special, yet a Releaſe of Actions perſonal is a good Bar.

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Child bringing a falſe Appeal, were not impriſoned.

Elegit, and Statutes are given by Parliament. *Elegit* muſt be by Inqueſt. The Obligee can't pray, that the Extenders ſhall take the Land, *&c.* at the Rate at which they priſe 'em in *Elegit*, but on Statute-Merchant, or Staple he may. No Execution on any of theſe Acts ſhall go againſt the Heir within Age, or if two Daughters be Heirs, and one of 'em within Age. After full and perfect Execution by Extent return'd and of Record, there cou'd be no Re-extent on any Eviction; but if the Extent be inſufficient, a new one ſhall go out.

By 32 *H.* 8. 5. If Lands had and delivered in Execution, be evicted before the Debt or Damages are wholly levied, the Ten't by Execution ſhall have a *Scire Facias*, and a new Execution: But the Act ſays, whereby the Ten't by Execution is clearly ſet without Remedy, therefore if but one Acre remain not evicted, or if the Eviction be by the Conuſee of the former Statute, or by the Conuſor's Wife recovering her Dower or by his Leſſee L. or Y. there can be no new Execution.

When the Conuſee has Remedy in practice for part or in value for all or part.

Tho' the Act ſays, till he or his Aſſigns ſhall have levied the whole Debt, *&c.* yet if there be ſeveral Aſſigns, all ſhall hold it but till the whole be paid.

Tho' the Words be, when Land, *&c.* is delivered in Execution, the Act extends to any Ten't by Execution; as if Seigniory be extended, and the Tenancy eſcheat, or one enter after the *Liberate* himſelf. But it re-

ch

ches not a Villein's Perquiſite, for the Lord is not Ten't by Execution thereof, but gains the whole Eſtate.

Executors, Adminiſtrators, and Aſſigns, ſhall have ſuch new Execution, tho' it be not expreſly given to 'em. Tho' the Act ſay they ſhall have a *Scire Facias* out of the ſame Court, if the Record be removed into another, they ſhall have it from that.

Tho' the Statute give it againſt thoſe that were Parties to the firſt Execution, their Heirs, Executors or Aſſigns, yet there ſhall be no new Execution againſt a Purchaſer or his Aſſigns, if the firſt were againſt him, unleſs they have other Land liable to it; if ſeveral Aſſigns have Land ſubject to the Execution, one *Scire Facias* lies againſt all. No new Execution can be had againſt the Obligor, *&c.* unleſs he were Party to the firſt Execution. Nor can a new Execution be had againſt the Purchaſer's Executor, tho' he were Party to the firſt, *for the Execution was had againſt the Purchaſer only in reſpect of his Land purchas'd of the Debtor.*

A Releaſe of all Actions or Executions, is a good Bar in a *Scire Facias*, either in Actions real or perſonal, or on a Fine; for tho' a *Scire Facias* be a Writ of Execution, yet inaſmuch as the Defendant may plead to it Matter to ouſt the Plaintiff of his Execution, it may be called an Action.

If the Plaintiff after Judgment releaſe all Executions, or Suits, and afterwards ſue Execution, the Defendant ſhall have an *Audita Querela:* But if K. releaſe all Suits, yet may he have Execution, becauſe the Court ought 291.

ex Officio to award Execution for him without any Suit, but not for a Subject.

Vid ſupra 122. After Execution ſued, if Plaintiff releaſe all Debts, or Duties, or Judgments, or Demands, an *Audita Querela* lies.

A Releaſe of Duties is no Bar in Account, for Duty extends only to Things certain; but what ſhall on the Account appear due is uncertain.

If Execution be ſued on a Recognizance by *Elegit*, and Conuſee make a Defeaſance, that if Conuſor do ſuch an Act the Recognizance ſhall be void, by this the Execution is diſcharged.

Demand is the largeſt Word in Law except Claim, for a Releaſe of Demands diſcharges all Sorts of Actions, Rights and Titles, Conditions before or after Breach, Executions, Appeals, Rents of all Kinds, Covenants, Annuities, Contracts, Recognizances, Statutes, Commons, *&c.*

1 Sid. 141. 1 Lev. 99. 3 Lev. 274. *But a Releaſe of all Demands doth not diſcharge Rent incident to a Rev'n due after the Releaſe, and generally if it be made on a particular Occaſion, that ſhall reſtrain the Generality of the Words.*

292. If one releaſe *omnes querelas aut loquelas*, this is as large as a Releaſe of all Actions, and releaſes all Cauſes of Actions tho' no Suit be then depending.

A Releaſe of all Actions diſcharges a Bond to pay Money on a Day to come, for it is *debitum in præſenti quamvis ſit ſolvendum in futuro*; and it is a Thing meerly in Action, and the Right of Action is in him that releaſes, tho' no Action lie when the Releaſe is

is made: So may an Executor releaſe an Action before he has proved the Will, and ſome ſay that the Ordinary may releaſe an Action, tho' he can have none: But a Releaſe of Actions does not diſcharge a Rent before the Day of Payment, for it is neither *debitum* nor *ſolvendum* at the Time of the Releaſe; nor is it meerly a Thing in Action, for it is grantable over: And the Law is the ſame as to an Annuity; but the Leſſor may releaſe or acquit the Rent, *&c.* A Releaſe of Actions by a Covenantee to his Covenantor, is no Bar to an Action for a Breach of a Covenant after the Releaſe; but a Releaſe of Covenants diſcharges the Covenant it ſelf.

The Leſſor may have an Action of Debt for Rent after each Day of Payment, for it is reſerv'd *for the Leſſor's Maintenance* in lieu of the Profits; but no Action lies on a Contract to pay Money at five ſeveral Days till all be paſt, *for there is but one Contract, and one Debt, and conſequently there can be but one Action of Debt*; but if a Recognizance be to pay Money at five ſeveral Days, after the firſt Day of Payment Execution lies for the ſum that then ought to be paid, for it is in nature of ſeveral Judgments: And the Law is the ſame of ſuch a Covenant, or Promiſe to pay Money, *&c. for as often as the Money is not paid according to the Covenant and Promiſe, ſo often is there a Breach of the Covenant or Promiſe, and conſequently ſo often an Action lies.*

After the *Miſe* join'd on the meer Right, 293.
the Ten't may tender Half a Mark to have

the Seiſin inquir'd, (except when the K. is Demandant,) and if the Seiſin be not found in the Time of the K. whereof the Demandant counts, he ſhall be finally barr'd: If it be found for him, the Jury ſhall enquire over.

The Oath of the Jury in Writ of Right is, 'I will truly ſay whether *A. B.* has more 'meer Right to hold the Tenements which 'C. D. demands againſt him by his Writ of 'Right, or *C. D.* to have 'em as he de-'mands, *&c. So help me God.*

N. B. This Oath is abſolute without ſaying to their Knowledge, for Judgment final is to be given, as in Attaint and Law Wager.

294. The terrible Judgment in Attaint is mitigated by the 23 *H.* 8. 3. Tho' the Words are, that the Party griev'd ſhall have it againſt the Party that ſhall have Judgment on the Verdict, yet it lies againſt his Executors:

(*a*) Bro 15. *The K.* (*a*) *may have an Attaint for a falſe Verdict in a civil Action brought by him; but*

(*b*) Bro 127. *in an Information,* (*b*) Qui tam, &c. *neither the K. nor Informer are fully Parties, and therefore neither of them can have an Attaint.*

(*c*) Bro. 130. (*c*) *But the Defendant in ſuch a Suit ſhall have an Attaint, tho' it lie not where the K. is ſole Party.*

No Conuſance ſhall be granted in Attaint, becauſe the Statute ſays expreſly that all Attaints ſhall be brought in one of the Benches.

The Defendant in ſome Caſes may wage his Law, *i. e.* ſwear that he owes not the Debt demanded, nor any Penny thereof and

nd this is a perpetual Bar to the Plaintiff: He that does it ought to bring with him 11 Perſons that ſhall avow on their Oaths, that hey think he ſwears true.

It lies in ſome Caſes in Debt, Detinue, nd Account; it lies for a Feme Covert, together with her Husband; for an Alien in he Language he can ſpeak; in Debt on Arbitrament, or Detinue on Bailment by another's Hand, for the *Debet* or *Detinet* is the Ground of thoſe Actions, and the Contract or Bailment is but the Conveyance, and not traverſable; it alſo lies for an Amercement in a Court-Baron; for the Succeſſor of an Abbot, becauſe the Houſe never dies.

But it lies not in Actions grounded on a Specialty; nor for one infamous; nor where he Plaintiff or Defendant is an Infant; nor where the Suit is for K. or his Benefit, as a *quo minus*, or Actions wherein a Contempt or Treſpaſs is ſuppos'd in the Defendant, *in which if the Defendant be found guilty, he ſhall be fin'd*; nor in Actions grounded on the Defendant's Breach of Promiſe, or a *Tort* done by him; *for the Law will not truſt his Honeſty in Diſcharge of ſuch Actions which are grounded on a Suppoſition of his Injuſtice*; nor does it lie *in Actions which are not grounded on what was tranſacted meerly between the Plaintiff and Defendant, but on the Act of another Perſon*, as in an Account againſt a Receiver on a Receipt *per autre mains*, where the Receipt is the Ground of the Action, and traverſable; but it would have lain if the Receipt had been by the Hands of his Wife, or of

one of his Monks, *for ſuch a Receipt is all one in Effect as a Receipt by the Defendant's own Hands, in reſpect of the Privity between them:* Nor does it lie in an Action ſounding in the Realty; as Account againſt a Bailiff, or Debt for Rent, or Detinue of an Indenture of a Leaſe, *&c.* Nor for a Debt of Record; as an Amercement in a Court-Leet; nor does it lie in Debt for an Account found before Auditors; nor in Debt againſt the Lord found in Surpluſage on ſuch Account, by Conſtruction of *W.* 2. Nor in Debt by a Gaoler for Victuals, becauſe he can't refuſe the Priſoner; nor in an Action by an Attorney for his Fees, or by a Labourer retain'd according to the Statute for his Wages, becauſe the firſt is compellable to be the Party's Attorney, and the other to be Servant; nor in an Action on a Penal Statute, nor for an Executor or Adminiſtrator.

Of Confirmation.

COnfirmation is a Conveyance of an Eſtate or Right *in Eſſe*, by which a voidable Eſtate is made ſure, or a particular Eſtate encreas'd: But it ſtrengthens not a void Eſtate, nor does it enlarge without Privity any more than a Releaſe.

296. Tho' a Releaſe by a Leſſor L. to the Leſſee Y. of his Leſſee, or by a Diſs'ee to the Leſſee Y. of his Diſs'or, be void; yet in both Caſes a Confirmation is good: But a bare *intereſſe termini* can't be confirm'd.

A poſſeſſion requiſite to Confirmation, but not ſufficient except it enlarges.

Leſſee

Leſſee L. makes a Leaſe for 30 Y. and after makes another for 60 Y. and Leſſor confirms the 2d, and then confirms the firſt; Leſſee L. dies within the 30 Y. Leſſee for 60 Y. may enter. Moor 67.

If the Eſtate of Tenant in Fee T. or L. be confirmed for a Day or an Hour, it is good for ever; and herein a Releaſe and Confirmation agree. And if the Eſtate or Demiſe, or Term of Leſſee Y. be confirmed for a Day, it is good for the whole, for the Addition of Parcel is repugnant, when all was confirmed before. But the Land may be confirmed to Leſſee Y. for Parcel of the Years, for the Years are ſeveral, but a State of Freehold is entire, and cannot be confirm'd for Part of the State.

A Diſs'ee, or Patron and Ordinary, may confirm a Leaſe Y. for Part in Reſpect of their Right or Intereſt: Yet an Attornment, which is a bare Aſſent, cannot be for Part, or on Condition. 297.

A Releaſe of a Rent, Right, or Condition to Leſſee L. enures to him in Rem'r or Rev'n; yet a Confirmation of a State L. does not, whether the particular Eſtate and Rem'r or Rev'n be in the ſame Perſon or divers. But the Confirmation of the Eſtate of one Jointenant enures to both: And if a Leaſe be made to *A.* and *B.* Rem'r to *B.*'s Heirs, the Confirmation of *B.*'s Eſtate confirms the Fee, for to many Purpoſes he had the whole Fee in him. A Feme Diſſeiſor makes a Feoffment to the Uſe of *A.* for L. Rem'r to her ſelf in T. *&c.* and marries the Diſs'ee who releaſes to *A.* this

perfects his Wife's Rem'r, *for tho' a Man cannot contract with his Wife, or transfer any Intereſt to her, yet ſhe may by Conſtruction of Law take Benefit of his Releaſe made to a third Perſon, and enuring by Way of Extinguiſhment.* But if Leſſee L. make a Leaſe L. Rem'r to his Leſſor, who releaſes to the 2d Leſſee, he cannot by this Releaſe perfect his own defeaſible Eſtate, but after 2d Leſſee's Death he ſhall be in his old Eſtate.

But a Confirmation and Releaſe agree in this, that either of them made to him in Rem'r, or Rev'n, enure to the Benefit of the particular Eſtate, whether they be made by Diſſeiſee or Feoffor on Condition, for they cannot enter, *but in reſpect of their*
298. *Right or Title to their antient Eſtates, which they cannot reveſt,* without deveſting the particular Eſtate, which againſt their own Deed they ſhall not do. If Tenant T. diſcontinue, and Diſcontinuee make a Leaſe L. and grant the Rev'n to the Iſſue, now the Iſſue ſhall not have a Formedon, for by that he muſt recover an Inheritance; but the Leſſee hath not the Inheritance, but the Iſſue in T. himſelf has it.

If Diſs'or make a Leaſe L. and levy a Fine of the Rev'n, and five Years paſs, the Diſs'ee cannot enter on the Leſſee L. for his Eſtate cannot be avoided without avoiding the Rev'n, *&c.* But if the particular Eſtate be by defeaſible Title, and the Remainder by good Title, the defeating that defeats not this; as if Leſſor L. diſſeiſe Leſſee, and make a Leaſe for L. of the

firſt

firſt Leſſee, Rem'r to *C.* and the firſt Leſſee enter, he leaves the Rem'r in *C. for the firſt Leſſee ſhall regain no more than the Eſtate whereof he was diſſeiſed*; nor ſhall the Leſſor's Eſtate be reveſted in him againſt his own Conveyance. And in many Caſes a Rem'r once well veſted, may ſubſiſt tho' the particular Eſtate ceaſe. As if a Leaſe Y. be made to an Infant, Rem'r in Fee, and the Infant diſagree at full Age: Or if a Leaſe be made to *A.* for *B.*'s Life, Rem'r to *C. A.* dies before the Occupant enters, there is no particular Eſtate, yet the Remainder continues. So if a Rent be granted to the Tenant of the Land for L. Rem'r in Fee, this Rem'r is good; for in Judgment of Law the particular Eſtate veſted *for an Inſtant* in the Ten't of the Land, tho' it were afterwards immediately ſuſpended. A Rent is granted to *A.* for *B.*'s L. Rem'r to *B.*'s Heirs, this Rem'r is good; yet the particular Eſtate muſt determine, and the Contingency happen in the ſame Inſtant; *but a Rem'r, which is to commence on a future Contingency, falls to the Ground if the particular Eſtate which ſupports it determine before the Contingency happens: But by* 10 & 11 W. 3. 16. *where an Eſtate is limited to one for L. with a Rem'r to his Son or Daughter*, &c. *they may take tho' they be born after their Father's Death.* Vide ſupra 59. Vide 3 Lev. 408.

A Releaſe by a Diſſ'ee to one of his Diſſeiſors, enures to him alone; but if the Eſtate of one be confirmed without ſaying more, he ſhall not hold his Companion out, becauſe nothing was confirmed but his

his Eſtate which was joint: But if theſe Words be added, To have and to hold the Land to him and his Heirs, he ſhall hold out the other. If the Diſſeiſee and *A.* diſſeiſe the Diſs'or's Heir, or the Grantee of Rent, and *A.* diſſeiſe the Ten't, and Diſs'ee or Grantee confirm the Eſtate of *A.* yet in neither Caſe doth this extend to paſs or extinguiſh the Right or Rent ſuſpended, as a Releaſe doth. It is ſaid, that if one Jointenant confirm the Eſtate of the other, that it remains joint; but if he add, to have and to hold the Land to him and his Heirs, the other ſhall have a ſole Eſtate. And if Leſſor confirm the Eſtate of his Leſſee, to hold his Eſtate in Fee, he paſſes nothing, for an Eſtate L. cannot be an Inheritance;
299. but if he confirm the Eſtate by theſe Words, to have the Land to him and his Heirs, he gives the Fee, for the *Habendum* and Premiſſes agree in Subſtance, and the *Habendum* may enlarge, tho' it cannot abridge the Premiſſes.

A Releaſe and Confirmation agree in this, that either of them made by a Leſſor L. to the Husband of a Feme Leſſee and the Wife, *habend'* for Term of their Lives, give the Husband an Eſtate by Way of Rem'r, or Increaſe of his Eſtate, for Term of his L. after her Death. If the Confirmation had been to them in Fee, it had given them the Fee jointly, and he had been ſeiſed in her Right for her Life. And if a Leaſe be made to Husband and Wife, *habendum* one Moiety to him for L. the other

other to her for L. and then the Leſſor confirm the Eſtate of both, *habend'* to them and their Heirs, this gives them a joint Fee in the Wife's Moiety, and the Husband a ſole Fee in his own, for the Husband's Eſtate in the Wife's Right in the one Moiety is as capable of a Confirmation as his own Eſtate in the other. A Confirmation of the State of two Leſſees in Common or joint Donees, *Habend'* in Fee, gives them a Fee in Common, for it enures according to the Quality of a State enlarged.

A. is Ten't L. with a Rem'r to *B.* for L. Leſſor confirms the Eſtate of both, *habend'* to them and their Heirs, *A.* is Ten't L. for one Moiety, Rem'r to *B.* for L. Rem'r to *A.* in Fee; of the other *A.* is Ten't L. Rem'r to *B.* in Fee, for *B.*'s Rem'r of the Fee in the Moiety drowns his particular Eſtate.

In the Caſe above where the Husband has a Rem'r for L. and the Wife is Ten't L. or where a Leaſe L. is made to *A.* Rem'r to him for L. of *C.* if the Husband or *A.* commit Waſte, an Action of Waſte lies for the intermediate Rem'r L. in the ſame Perſon that does the Wrong, ſhall not make it diſpuniſhable.

If one make a Leaſe Y. to a Feme Sole, who marries, and then the Leſſor confirm the State of the Husband and the Wife, *habend'* the Land for Term of their two Lives, this gives 'em a joint Freehold, for they had none before, and tho' the Wife's Freehold be not in the Husband's Diſpoſal, a Leaſe Y. is. 300.

It

It is ſaid, that whatever I may defeat by my Entry, I may make good by my Confirmation; therefore if a Feoffor on Condition confirm a Grant of Rent by the Feoffee, or a Diſs'ee confirm a Grant by the Diſs'or or his Heir, the Rent remains after Re-entry or Recovery, whether the Entry were lawful when the Confirmation was made or not: But in all theſe Caſes a Releaſe would be void.

At Law, if the Patron and Ordinary, or the Patron alone of a Chapel Donative, had confirm'd a Grant of a Rent made by a Parſon or Chaplain, or licenſed them to make ſuch Grant, it remained effectual according to the Purport of it. *Perſona Imperſonata* is the Incumbent of a Church Parochial, in whoſe Perſon the Church may ſue for, and defend her Right.

The Ordinary alone may confirm without Conſent of Dean and Chapter, but when the ſame Perſon is Patron and Ordinary, his Confirmation can't make it good after the Deceaſe of the Incumbent, but only during his own Life, unleſs Dean and Chapter agree. For the Advowſon is Part of the Poſſeſſions of the Biſhoprick, the Value whereof can't be leſſen'd by the Biſhop without their Conſent.

If one be Patron of the Church of *B.* as Parſon of *C.* his Confirmation of the Grant of a Rent out of *B.* without his Patron's Aſſent can't make it perpetual, no more than that of Ten't L. If the Eſtate of the Patron that confirms a Grant be conditional, and

and then the Condition be broken, the Confirmation is void.

A Confirmation by Ten't T. remains good only during his Life, and that of the Succeſſor's that come in by him; but if the Entail be barr'd, it is good for ever; if it be diſcontinued, it is good during the Diſcontinuance.

In all Caſes the Confirmation muſt be during the Life of the Incumbent that made the Grant, for after his Death it is abſolutely void.

No ſole Corporation could ever make an abſolute Alienation without the Conſent of ſome other, but all Corporations Aggregate of many Perſons capable, as Dean and Chapter, *&c.* or the Head of a Corporation Aggregate of many Perſons dead in Law, as an Abbot or Prior with the Conſent of the Covent, might make an abſolute Alienation; ſo might a Biſhop with a Confirmation of the Chapter; and if there were two Chapters, with the Confirmation of both, and if one of them were diſſolved, with the Confirmation of the other, but the Conſent of the Founder or Patron was not required. 301.

If a Diſs'or make a Deed of Feoffment, and a Letter of Attorney to deliver Seiſin to *A.* and the Diſſeiſee confirm the Eſtate of *A.* or the Deed made to *A.* this is clearly void. But if a Biſhop had made a Deed of Feoffment, and Lettter of Attorney, or a Charter to K. and before Livery or Inrollment the Chapter had confirmed the Deed

no livery made
The Estate is not
vested thereupon
Nothing to support
the Confirmation.

or

or Charter, this was good, for the Aſſent is ſufficient.

If Ten't L. whether on Condition or abſolute, grant a Rent in Fee, a Confirmation by Leſſor makes it effectual, (and yet by Law it was determinable by Death of Ten't L.) becauſe the Grant was in Fee. But if the Grant be to the Grantee and his Heirs by expreſs Words for the Grantor's Life, and Leſſor confirm it, it ſhall determine by the Death of the Grantor.

Dedi & Conceſſi are general Words, and may amount to a Grant, Feoffment, Giſt, Releaſe, Confirmation, Surrender, *&c.* therefore if a Diſs'ee by Deed *dat vel concedit* the Land to the Diſs'or, this amounts to a Confirmation; or if a Leſſor make a Deed with ſuch Words to the Leſſee, it gives him an Eſtate L. T. or in Fee, according to the Purport of it; and if he make a 302. Deed to him in theſe Words, *voluit quod haberet Terram pro Termino Vitæ*, he enlarges his Eſtate for Term of L. and there are many other Words, as *Dimiſi*, *&c.* which one may uſe in Confirmation.

But a Releaſe, Confirmation, or Surrender, *&c.* can't amount to a Grant, *&c.* nor a Surrender to a Confirmation or Releaſe, for theſe are peculiar Conveyances deſtin'd to a ſpecial End.

If the Parſon and Ordinary make a Leaſe Y. of the Glebe to the Patron, or a Diſs'or grant a Rent to the Diſs'ee, or make a Leaſe L. Rem'r to the Diſs'ee; in all theſe Caſes, if the Patron or Diſs'ee reſpectively grant

over

over the Term or Rent, or Rem'r, ſuch Deed amounts to a Grant and Confirmation, for they can't avoid their own Grants.

If the Diſs'ee and Diſs'or's Heir join in a Feoffment by Deed, this is the Feoffment of the Heir, and Confirmation of the Diſſeiſee, for the Land ever paſſes from him that hath the State in him; ſo where *Ceſtuyque* Uſe, and the Feoffees joined in a Feoffment after the 1 *R.* 3. it was the Feoffment of the Feoffees: But if the Diſs'or and Diſs'ee join in a Deed of Feoffment, and enter, and make Livery, it is the Feoffment of the Diſs'ee, and Confirmation of the Diſs'or.

If Ten't L. and he in Rem'r or Rev'n in Fee join in Feoffment by Deed, the Freehold moves from Ten't L. the Fee from the other: If at Law they had joined in a Parol Feoffment, the whole moved from him that had the Fee; and it is ſaid that it ſhall be conſtrued a Surrender of Ten't L. *for in the firſt Caſe the Freehold ſhall paſs from Ten't L. and the Deed of Feoffment ſhall amount to a Grant of the Reverſion, but a Rev'n can't paſs by Parol, therefore in the 2d Caſe the Law will conſtrue the Fee to be executed in the Leſſor, by an implied Surrender of the State L.*

If Ten't L. and he in Rem'r in T. join in a Fine, this is no Diſcontinuance, for the Grant of the Rem'r in Judgment of Law precedes the Grant of the particular Eſtate. But if Ten't L. and he in Rem't L. join in a Feoffment, both forfeit their Eſtates, nor ſhall 1 Rep. 76. D

ſhall it be conſtrued the Feoffment of Ten't L. and Confirmation of the Rem'r Man.

303. In good Order you muſt plead, 1. To the Juriſdiction. 2. To the Perſon; firſt of the Plaintiff, then of the Defendant. 3. To the Count. 4. To the Writ. 5. To the Action. And if any of theſe are miſordered, the Benefit of the former is loſt.

The Count muſt be conformable to the Writ, the Bar to the Count, *&c.* and the Judgment to the Count, and none narrower or broader than the other.

It is ſufficient in Bars to have a Certainty to a common Intent, *i.e. That it be ſo certain that, generally ſpeaking, if it be true, the Plaintiff can have no Cauſe of Action; as in Treſpaſs it is a good Bar that the Land is the Defendant's Freehold, and yet it may be that he has leaſed it for Y. to the Plaintiff,* &c. But in Indictments, Counts, Replications, *&c.* a greater Certainty is required, which is called a Certainty to a certain Intent in General; *for if without a violent Conſtruction of the Words of the Record they may be true, and yet the Defendant not guilty, the Law will not condemn him; as if one be indicted for coining Alchymy,* ad inſtar Pecuniæ Regis, *without ſhewing what Money.* But in Eſtoppels, *which are odious, becauſe they conclude a Man from alledging the Truth,* there muſt be a Certainty to every Particular, *and therefore Exceptions may be taken againſt them, which are ſo nice, that they will not be allowed in any other Caſe.*

A Plea

A Plea in Abatement of the Writ, or after the latter Continuance, ought to be pleaded certainly.

The antient Forms of Pleading are to be obſerved, therefore in Counts it is ſufficient to ſay *cum* J. S. *ſeiſitus, &c. Dimiſit*, or *Dedit*, without expreſly ſaying that he was ſeiſed, and did demiſe, (yet the Plaintiff, if he will, may ſay ſo,) but in Bars, Replications, and other Pleas, a Seiſin muſt be alledged in Donor or Leſſor.

Counts and Avowries, becauſe they are in the Nature of Counts,) need not to be averred, but all other Pleas in the Affirmative muſt be averred, but thoſe in the Negative ought not.

Matter of Inducement, which is only alledged in order to bring in the principal Matter, needs not to be ſo certainly alledged as Matter of Subſtance.

All Pleas muſt be alledged directly, and not by Way of Rehearſal; nor is it ſufficient that what ought to be expreſly pleaded may be deduced by Argument from what is pleaded.

When a Record is the Ground of the Suit, or of the Subſtance of the Plea, it muſt be certainly alledged; but Sentences in Courts Eccleſiaſtical may be alledged Summarily, as that a Divorce was betwixt ſuch Parties for ſuch a Cauſe, and before ſuch a Judge, *& concurrentibus his quæ in jure requiruntur. For it is to no Purpoſe to alledge them particularly, becauſe the Forms of thoſe Courts are different from thoſe of Common Law, and our Judges preſume that they are obſerved by the*

the Judges of thoſe Courts, but the Judge muſt be named, that the Court may write to him.

It may be generally alledged that *J. S.* was ſeiſed in Fee-ſimple, but the Commencement of particular Eſtates muſt be ſhew'd, (*becauſe they could not originally commence without a Conveyance which muſt be ſhew'd*,) unleſs they be alledged by Way of Inducement only.

Special and ſubſtantial Matter alledged by either Party ought to be ſpecially anſwered, and not paſſed over in general Pleading.

All Pleas are conſtrued moſt ſtrongly againſt him that pleads them.

No Plea is good, whereof no Trial can be had.

The Ten't before his Default ſaved may plead Pleas proving the Writ abated, (*becauſe it is Error in Fact to proceed after*,) or Matter apparent in the Record, but not thoſe which prove it only abateable, as taking Husband.

Where one is authoriſed to do a Thing by Common Law, Statute, Cuſtom, Grant, or Commiſſion, he ought to purſue the Subſtance of it accordingly.

Neceſſary Circumſtances, as Livery and Attornment in the Plea of a Feoffment of a Manor, are implied.

A Defect in Count, Bar, *&c.* by Omiſſion of ſome Circumſtances may be ſaved by the Plea of the adverſe Party, but Inſufficiency of Matter cannot.

Sur-

Surpluſage vitiates not, unleſs it be contrariant to the Matter before.

What is apparent by neceſſary Collection from the Record needs not to be averred.

As to affirmative Covenants, one may plead generally Performance of all; but as to thoſe in the Negative he muſt plead ſpecially: Of Disjunctives, he muſt ſhew which he hath performed; thoſe to be done of Record muſt be ſhewn ſpecially.

Pleas amounting to the General Iſſue are not to be allowed, but the General Iſſue is to be enter'd. *But where the Matter pleaded contains Matter of Law, it may be pleaded, notwithſtanding it may be ſhewn on the General Iſſue.* 2 Vent. 295.

Pleas ought to conclude properly, thoſe to the Writ to conclude to the Writ, thoſe in Bar to the Action; Eſtoppels muſt rely on the Eſtoppel.

Where a Man *ſhews the ſpecial Circumſtances of his Caſe*, and concludes *& ſic* he did ſuch and ſuch a Thing, the Concluſion waves not the ſpecial Matter, but the Generality thereof is qualified thereby; but regularly where the Concluſion is in the Negative, the ſpecial Matter is waved, *eſpecially* where it goes to the Point of the Action, *for there the ſpecial Matter is alledged to no Purpoſe; but in an Action on a Bond, one may plead that it was delivered to* J. S. *to be delivered to the Obligee on a Condition not yet performed, and ſo it is not his Deed, and the ſpecial Matter is not waved.* Finch of Law 419. 1 Vent. 210.

A ſe-

304. A ſecond Plea containing Matter ſubſequent to the former, and not fortifying the ſame (which is called a Departure,) is vitious; as when the Ten't pleads a Deſcent, and the Demandant avoids it by Pleading a Feoffment from the Ten't, and he rejoins that the Feoffment was on Condition. So if one plead Performance of Covenants, and the Plaintiff reply, that he did not ſuch an Act, *&c.* and the Defendant rejoin that he offer'd to do it. Or if a Man in his Bar make a Title at Common Law, *(as if he plead generally that a Leaſe T. was made to him,* &c. *which being generally alledged, ſhall* Finch 393. *be intended to be meant of a Leaſe made good by the Rules of Common Law,)* and in the Rejoinder maintain it by Cuſtom or Statute. Or if one plead a Feoffment in Bar, and maintain it by Diſſeiſin and Releaſe, or Leaſe and Releaſe; or plead a Gift in Tail and maintain it by a Recovery in Value. But one may count of a Gift T. and make it good in the Replication by a Recovery in Value *of the Lands in Queſtion, by Force of a Warranty, in lieu of other Lands in T. evicted from the Donee, whereof he ſhall be ſeiſed of ſuch Eſtate as he had in the Land loſt,* for there can be no other Count: And he that pleads a Feoffment in Bar, may plead a Releaſe to his Feoffor in the Rejoinder, for it fortifies the Bar.

Tho' one may in proper Time uſe divers Dilatories, yet a Plea in Bar containing double Matter, *viz.* requiring ſeveral An-

ſwers, is vitious, but where there are di- Co. L. 303.
vers Defendants, each of them may plead ſeveral Pleas; *and by* 4 & 5 Annæ 16. *one may with Leave of the Court plead divers Matters in Bar*, and on a general Iſſue one may give as many diſtinct Matters as he can in Evidence; they may alſo be found by ſpecial Verdict.

If he, that has a Seigniory, Rent or Com- 305.
mon, confirm the Eſtate of the Ten't of the Land, yet the Charges and Services remain, but if he releaſe to the Ten't he extinguiſhes them. The Lord can't by Releaſe or Confirmation reſerve any new Services, but he may abridge the old; and if a Meſne confirm the State of an Abbot, that holds by certain Services, to hold of him in Frankalmoine, this is good, for nothing new is reſerved, but only that he holds of him as he did before; if the Lord releaſe Part of the Services, Relief, *&c.* incident to the Tenure ſtill remain, and are not diſcharged without ſpecial Words; and if Lord by Kt.'s Service releaſe all his Right, and all Actions, Services and Demands except the Tenure by Kt. Service, Wardſhip, *&c.* remain.

If Donor reſerve 2 *s. pro omnibus Servitiis.* *Q.* If Donee ſhall pay Relief.

It ſeems the Lord Paramount can't by his Releaſe or Confirmation abridge the Services of Ten't Paravail for Want of Privity. *Q.* If Confirmation can abridge a Rent-Charge, as it is certain a Releaſe may.

Tho' one may detain a Villein in Groſs, 306.
yet he can gain no Poſſeſſion of him as of his

For Confirmation they are a void Estate.

his Villein, nor put the Owner out of Poſſeſſion, therefore a Confirmation of the Eſtate of ſuch a Detainer is void; unleſs there be Words of Grant in it, and then it enures as a Grant, not as a Confirmation.

Contra Hob. 95.

But one may be ouſted of the Poſſeſſion of the Cuſtody of his Ward. And the Poſſeſſion of a Villein regardant may be gained by Diſs'in of the Manor, and whilſt the Diſs'ee's Entry is lawful, he may reſeiſe him before he enters; and Things regardant and appurtenant paſs by Feoffment of a Manor, without ſaying *cum pertinentiis.*

307. The Grant of a Seigniory or Rent-Charge to the Ten't enures by Way of Extinguiſhment, for the ſame Man can't be Lord and Ten't, or receive Rent out of his own Land. Such a Grant to the Ten't and a Stranger enures by Way of Extinguiſhment as to one Moiety, and by Way of Grant as to the other.

The Releaſe of a Leſſor Y. to his Leſſee enlarges his Eſtate for L. but his Confirmation enlarges it not at all.

An Infant makes a Leaſe Y. and the Leſſee grants Part of the Term to another, and the Infant at full Age releaſes to the Grantee, his Releaſe is void for Want of Privity; but if the Leſſee grant the whole Term, the Leſſor's Releaſe to the Grantee is good, and his Confirmation is good in both Caſes.

The Difference between a Rent newly created and a Rent in eſſe, to a Grantee who knows not of it.

If a Man grant a new Rent for L. and then confirm the Eſtate of his Grantee in Fee, he enlarges not his Eſtate without new Clauſe of Diſtreſs, becauſe he that con-

a new Clause of Distress annexed to a new Grant.

firm

firms hath no Rev'n in the Rent. But if one ſeis'd of a Rent in Fee grant the ſame for L. he may by his Confirmation or Releaſe enlarge the Eſtate of the Grantee.

If the Grantee of a new Rent ſurrender or cancel the Deed by which it was granted, he deſtroys the Rent, *but it ſeems that if a Stranger deſtroy the Deed, the Rent is not deſtroy'd thereby, tho' a Thing merely in Action be deſtroy'd by the Deſtruction of the Deed by a Stranger, and if the Grantee of the Rent deliver up the Deed to the Grantor, he does not thereby ſurrender the Rent, but he may ſue for it, if he can get the Deed again, for a Choſe in Grant muſt be ſurrendered by Deed.* 1 Vent. 297.

Of Attornment.

ATtornment is the Agreement of a Ten't to the Grant of a Seigniory, Rent, Rev'n, or Rem'r, (*without which no Grant thereof could take any Effect before* 4 & 5 Annæ 16. *by which Statute Attornment is made needleſs.*) It ought to have been in the Life of the Grantor and Grantee, and might be expreſs'd or imply'd; expreſs Attornment is by Words or Writing expreſſing the Ten'ts Agreement, as ſaying that he agrees or uſing Words Tantamount. An implied Attornment is when the Ten't knowing of the Grant, pays the Rent to the Grantee, *&c.* but there could be no Attornment without Notice of the Grant expreſs'd or imply'd, therefore if a Bailiff who us'd to receive the Rent had purchas'd a Ma- 309.

nor, Payment to him without Notice of the Purchaſe was no Attornment: So if the Lord had levy'd a Fine, and taken back a State in Fee, and the Ten't had continued Payment.

Attornment was good, tho' the Thing granted were altered before Attornment; as if a Rent-Service became Seck by Surpluſage; and if the Grant were of two Acres, and a Fine levied of one before Attornment, yet the Ten't might attorn for the other.

If the Rev'n of three Acres were granted, and Leſſee attorn'd for one, or ſurrender'd one to the Grantee, this was good for all. So if the Grant were to two, and he attorn'd to one according to the Grant, this enur'd to both; and if one died he might attorn to the Survivor. Attornment to Grantee L. enur'd to the Benefit of Rem'r Man, tho' the Ten't ſaid expreſly that he attorn'd only to the Grant for L. *for Attornment being but a bare Agreement to a Grant could neither enlarge nor diminiſh the Operation thereof.* Attornment to *Ceſtuyque* Uſe was a good Attornment to the Grantee.

310. If a Grant were made to *A.* for *L.* Rem't to *B.* in Fee, and *A.* had died, there could be no Attornment to *B. for one can't take a preſent Eſtate in Poſſeſſion by Force of ſuch Words in a Grant which gives him a Rem'r only.* But if a Grant were to a Man and a Woman, and before Attornment they intermarried, the Attornment was good, tho' they did not then take by Moieties, *for the Words of the Grant may ſtill have their Effect according*

according to the Purport of it, tho' the Quality of the Grantee's Eſtate be different from what it would have been, if the Ten't had attorn'd before Marriage.

If a Feme had married her Grantee before Attornment, yet might the Ten't attorn, but not if ſhe had married another, for that would have been an imply'd Countermand of the Attornment, *which would then be to the Husband's Prejudice, and defeat his Eſtate for the Wife's Life gained by the Marriage*; and if Grantor before Attornment had made a Grant to another, and the Ten't had attorn'd to the 2d Grantee, he could not after attorn to the firſt, tho' the firſt Grant were in T. the 2d for L. So if a Rev'n on a State L. were granted, and before Attornment the Eſtate L. were confirm'd in T. the Attornment was countermanded; ſo if a Grant were made of a Rev'n on a State for Y. and before Attornment, the State of the Leſſee were confirmed for L.

Where there were two ſeveral Grantees, Attornment to both was void, *for by the Purport of each Grant the Whole is expreſly given to the reſpective Grantees, and it ſhall not be in the Power of the Ten't to make ſuch Grants enure by giving a Moiety only to each.* So if a Rev'n were granted for L. and after granted to the ſame Man for Y. and Ten't attorn to both Grants. Or if one Grant were made to *J.* Biſhop of *L.* and his Succeſſors, and another to him and his Heirs, and the Ten't attorn'd to both.

If *A.* had granted *B.* Acre or *W.* Acre; and Ten't had attorn'd, and Grantee make his Election, the Attornment was good, for it was made to the Grant in such sort as the Grant was made.

If a Man had aliened a Manor, which was Parcel in Demesne and Parcel in Service, the Services without Attornment pass'd not in Possession, nor in Right, except those of Ten'ts W. or Copyholders, which needed no Attornment.

The Attornment had Relation to some Purposes to make the Thing granted pass from the Grantor *ab initio*; as if the Grantee were an Alien before Attornment made Denizen, K. should have the Thing granted, for as between the Parties it so pass'd, but not so as to charge the Ten'ts with Arrears of Rent, or for Waste in the mean Time.

311. If a Lord had let his Manor for L. or Y. and the Ten'ts had attorn'd, and then the Rev'n were granted, the Attornment of such Lessee bound the Ten'ts of the Manor.

On Grants of a Seigniory, Rent-Service, Rev'n or Rem'r, he that was immediately privy to the Grantor ought to attorn; therefore if there were Lord and Ten't, and the Ten't had made a Lease L. or Gift T. *&c.* or if there were Lord Mesne and Ten't, and the Lord had granted his Seigniory, he in Rev'n in the first Case, or Mesne in the 2d, ought to have attorn'd. If Ten't in Fee had made a Lease L. Rem'r in Fee, the Ten't L. ought to have attorn'd to a Grant of

of the Seigniory, for he was Ten't as to this Intent to the Lord, for during his Life the Lord ſhall avow upon him only, and yet the Rem'r is alſo holden mediately of the Lord, and ſhall eſcheat if he in Rem'r die without Heir; and ſuch Eſcheat ſhall drown the Seigniory, for there can't remain a particular Eſtate in it: But if a Rent-Charge in Fee be granted for L. and then he that has the Rev'n of the Rent purchaſe the Land, the Grantee ſhall enjoy it for L. *for the Rent-Charge can have no other Eſtate iſſuing out of it to which it may have Relation; but in the Caſe above, when an Eſtate for L. only remains in a Seigniory, it can't ſupport the Seigniory paramount.* Vide 231, 378. Y

But to a Grant of a Rent-Charge, or Rent-Seck iſſuing out of a Freehold, the Freeholder was to attorn, becauſe the Freehold was charged; therefore tho' the Diſs'ee might have attorn'd to a Grant of a Rent-Service, the Diſs'or only could attorn to a Grant of a Rent-Charge. And if the Lord had granted the Rent without the Homage, the Diſs'or only could attorn, for it paſs'd as a Rent-Seck. If the Rev'n only were charged with a Rent-Charge, he in Rev'n ſhould attorn to the Grant of it. The Law remain'd as to the Difference of Attornment after the 21 *H.* 8. 19. for tho' the Lord needed not avow on any Perſon in certain, the Privity remain'd notwithſtanding between him and the Ten't. 312.

If he that had a Rent-Charge in Fee had granted it for L. and the Ten't of the Land

had attorn'd, and then the Rev'n of the Rent-Charge were granted, the Grantee for L. might have attorn'd alone.

There was no Need of Attornment, except to Grants of Rem'rs, but where the Ten't was to be subject to Tenure, Attendance or Payment of Rent to the Grantee, therefore it was not requir'd in Grants of Commons, Annuities, *&c.*

Attornment of the Husband bound the Wife, and where he that should attorn wa Grantee, Acceptance of the Deed was sufficient Attornment: Therefore if there were Lord and Ten't, and the Ten't had made a Lease L. to a Feme, Rem'r in Fee, and Lessee L. had married, and the Lord had granted his Seigniory to the Husband, who in Right of his Wife ought to have attorn'd, and he had accepted the Deed, this was a good Attornment in Law; and tho' the Services were suspended during the Coverture, the Husband shall have them after the
313. Death of his Wife. If the Lord had granted the Services to the Ten't and a Stranger, and the Ten't had accepted the Deed, this had extinguished the one Moiety, and vested the other in the Grantee. If the Lord had granted the Seigniory to the Wife of his Ten't, and the Ten't had accepted the Deed, this was a good Attornment; and tho' the Services were suspended during the Coverture, the Wife and her Heirs shall have the full Benefit of the Grant afterwards. If the Ten't had made a Lease L. Rem'r in Fee, and the Lord had granted his Services to Ten't L. and his Heirs, this gave him a Fee,

Fee, (for it ſhall not enure by Way of Extinguiſhment againſt the expreſs Words and Purport of the Grant,) and it ſhall take Effect in his Heirs by Deſcent, for the Inheritance of the Seigniory was in Ten't L. and the Suſpenſion was only during his L.

Unity of Poſſeſſion of Rent, *&c.* and of the Land out of which it iſſues of an Eſtate equally high and perdurable in both, extinguiſhes the Rent, *&c.* But where a Man has a greater or more perdurable Eſtate in the one than in the other, the Rent ſhall be ſuſpended only during the Unity of Poſſeſſion; as where his Eſtate in the Land is conditional, or gain'd by Diſs'in, *&c.*

If the Ten't had made a Leaſe L. ſaving 314.
the Rev'n, and the Lord had granted his Seigniory to the Ten't L. the Leſſor ought to have attorn'd, and by ſuch a Grant the Seigniory is ſuſpended during the Grantee's L. but his Heirs ſhall have it by Deſcent. And inaſmuch as the Suſpenſion is but for Part of the Eſtate, it is in Being as to Things concerning the Right; therefore if he in Rev'n die without Heir during the Life of the Grantee, the Rev'n ſhall eſcheat to the Grantee; but as to the Poſſeſſion, during the particular Eſtate, the Grantee ſhall have no Benefit, as to have Rent, Ward, Relief, *&c.* nor can he grant it over, becauſe he took it ſuſpended, and it never was in *Eſſe* in him; yet when the Lord takes a Leaſe of the Tenancy, he may grant over the Seigniory; but when the whole Eſtate in the Seigniory is ſuſpended, it is neither grantable over, nor ſhall the Tenancy eſcheat.

If the Ten't had holden by divers Services, and the Lord had granted the Seigniory, and the Ten't had attorn'd by paying any of the Services, this was good for the whole: So if they were granted by Fine, and the Grantee had recovered any of 'em in a *Scire Facias* on the Fine.

No Attornment was ever requisite to a Grant to or by K. But my Lord *Coke* says, that it was required in K.'s Grants of Lands of the Dutchy of *Lancaster* out of the County Palatine; (*a*) *but he has been contradicted by later Authorities.*

(*a*) 1 Syd. 189. Lev. 28. 315.

Attornment to a Grant of Rent by Payment of a Penny, was good, and gave a Seisin in Law, but Payment of Money or any Thing else in the Name of Seisin of the Rent, gave both an actual Seisin to maintain an Assise, and was also an Attornment in Law, and yet what was so paid was not Part of the Rent, nor should it be abated out of it.

Attornment made, or Seisin of Rent given by one Jointenant binds the rest. The Heir or Assignee of the Ten't might attorn, if the Ten't had died, or made an Assignment before he had attorn'd.

An Infant was compellable to attorn in a *quod juris Clamat, &c.* but he should be at no Prejudice thereby, for at full Age he might disclaim to hold of the Conusee, or say that he held by lesser Services.

The Attornment of an Infant, or of one Deaf and Dumb by Signs, was good. But one *Non Compos* could not attorn.

If a Rev'n expectant on a Leaſe Y. or Tenancy by Execution, *&c.* were granted, the Freehold did not paſs till the particular Ten't had attorn'd. If a Rev'n expectant on a State L. were granted, the Ten't of the Land ought to have attorn'd, whether he were the Leſſee himſelf, or his Aſſignee; for after Aſſignment by Leſſee L. there is no Tenure nor Attendance betwixt him and Leſſor, tho' the Aſſignment were on Condition only. But tho' Ten't in Dower or by Curteſy had granted over their Eſtates, yet might they have attorn'd, for after the Grant of their Eſtates, they are ſubject to an Action of Waſte; and if the Rent be granted by Fine, it muſt ſuppoſe 'em Ten'ts, and the *quid juris Clamat* ought to have been brought againſt *them, becauſe they were* the Ten'ts at the Time of the Note levied. But the Grantee of the Rev'n ſhall have Waſte againſt the Aſſignee of Ten't in Dower or by Curteſy only, and muſt rehearſe the Statute, which proves that he could not have Prohibition of Waſte at Common Law; therefore it is ſaid that the Attornment of the Aſſignee was ſufficient. 316.

A Rev'n or Rem'r expectant on a State T. could not paſs by Grant without Attornment of Ten't T. but Ten't T. could not be compell'd to attorn in a *quid juris Clamat*, nor could Ten't T. *apres* but his Aſſignee might, and even Ten't in T. ſhould be compell'd to attorn in a *per quæ Servitia*, or *quem redditum Reddit.*

If a Leaſe Y. were made, Rem'r L. the Attornment of Leſſee, or Rem'r Man to a Grant of the Rev'n bound the other.

317. Rent paſſes impliedly by a Grant of the Rev'n, *non è converſo.* If one had made a Leaſe L. and after had confirmed the Eſtate of the Leſſee, Rem'r to a Stranger in Fee, and the Leſſee had accepted the Deed, this was a good Attornment, and he in Rem'r ſhall have Waſte, if he can ſhew the Deed; but being privy in Eſtate he muſt ſhew it, and yet he has no Remedy for it during the Leſſee's L. and when the Rem'r is executed he need not ſhew it; for this Cauſe it is the beſt Way to have the Confirmation in this Caſe by Indentures, and to deliver one Part to him to whom the Rem'r is limited.

318. If Jointenants had joined in a Leaſe, and after one had releaſed to all the reſt, or to one of 'em only, no Attornment was needful in Reſpect of the Privity between the Leſſee and all the Jointenants, by accepting 'em all for his Leſſors; but if one Jointenant only had made a Leaſe Y. and then had releaſed to the other, the Attornment of the Leſſee was requiſite.

If one had made a Leaſe L. Rem'r L. no Attornment was needful to his Releaſe to him in Rem'r.

If the Grant were defeaſible, the Ten't was not compellable to attorn in a *quid juris, &c.* as if a Fine were levied of a Rev'n holden *in Capite* without Licenſe, for the K. might ſeiſe the Rev'n, and Rent. So if an Infant had levied a Fine, or Ten't in ancient Demeſne had levied a Fine at Law, or Ten't in

T. had

T. had levied a Fine before 4 *H.* 7. 24. or any Ten't had aliened in Mortmain.

If Leſſor L. or Y. had diſſeiſed or ouſted his Leſſee, and made a Feoffment in Fee, and Leſſee had re-enter'd, this was a good Attornment; and it ſeems that the Law is the ſame if he recover in Aſſiſe, *for there is no Default in the Feoffee, and there is no Reaſon that the Feoffor ſhould have his Rev'n again againſt his own expreſs Grant, which paſſed the Feoffor's Right to the Rev'n incluſively in the Feoffment, and it would be a hard Conſtruction to leave a naked Rev'n in the Feoffee without any Remedy to recover the Rent, &c. incident thereto.* By ſuch Re-entry the Rent reſerv'd on the Leaſe is revived, becauſe incident to the Rev'n; but if he, that has a Rent in Fee, diſſeiſe the Ten't, and make ſuch Feoffment, it never revives. 319.

because this Rent is not incident to the Reversion.

If there be two Leſſees, a Re-entry by one has the ſame Effect, as a Re-entry by both. Leſſor L. grants the Rev'n for Life, the Leſſee attorns, and then the Leſſor diſſeiſes the Leſſee, and makes a Feoffment, Leſſee re-enters, this leaves the Rev'n in the Grantee L. and another in the Feoffee, but was no Attornment of the Grantee for L. of the Rev'n, becauſe he did no Act. *Sed Q. for if this ſhould not amount to an Attornment, the ſame Inconveniences ſeem to follow as in the Caſe above of the Leſſee L. recovering againſt the Feoffee of his Leſſor, who tho' he never ſo much diſagrees to the Act of his Leſſor, cannot re-continue his own Eſtate without attorning implicitely to the Feoffee.*

If

If a Leaſe were made to *A.* for L. Rem'r to *B.* in T. Rem'r to *A.* in Fee, and *A.* had granted his Rem'r in Fee to *C.* by his Deed, it paſſed preſently, for it would be in vain that *A.* ſhould attorn to a Grant by himſelf. *Note*; When the Anceſtor takes a Freehold, and after a Rem'r is limited to his Heirs, the Fee veſts in him; but if the firſt Eſtate be but for Y. it does not.

320. If a Seigniory or Rev'n be granted by Fine, the Thing granted is preſently in the Grantee without Attornment: And he may ſeiſe a Ward, or enter into Land eſcheated, or for a Forfeiture; but he could not before 4 & 5 *Annæ* 16. diſtrain, or have an Action of Waſte, or a Writ of *Conſimili Caſu*, or *Caſu Proviſo*, or of Cuſtoms and Services without Attornment, but he might have all Things which may be ſeiſed without Suit.

If Ten't L. had attorned in a *quid juris clamat* generally, he loſt all Privileges; as to have the Land without Impeachment of Waſte, &c. becauſe the Writ ſuppoſes him bare Ten't L. but if he claimed 'em they ſhould either be allowed and enter'd of Record, or he ſhould not be compelled to attorn, (but Attornment in *Pais* expreſs or implied loſes no Privilege.) The Ten't could not be compelled to attorn to a Grant by an Infant till he were of full Age, becauſe he could not till then acknowledge his Privilege. If a Meſnalty were granted for L. Rem'r in Fee, and the Ten't had at-

torn'd

torn'd in a *per quæ Servitia* to Grantee L. ſaving his Acquittal, and Grantee for L. had died, he in Rem'r could not diſtrain, till he had likewiſe acknowledged the Acquittal in a *per quæ Servitia* brought by him.

But if ſuch Meſnalty or Rev'n granted by Fine had eſcheated before Attornment, the Lord Paramount might diſtrain, *&c.* without Attornment, for he, if he pleaſed, might have avowed on the Grantee, tho' he were not compellable to do it in the Grantor's Life, and the Meſnalty came to him by Title Paramount in lieu of his former Seigniory. But the Heir or Aſſignee of ſuch Conuſee could not diſtrain without Attornment; nor his Bargainee, or Conuſee, nor his Feoffee, where he diſſeis'd the Leſſee and made a Feoffment, and Leſſee re-enter'd, for thoſe that come to the Rev'n by the Conveyance of the Party ſhall not have a greater Privilege than he from whom they claim.

No Attornment was needful where a Rev'n was extended, or granted by Fine to the Uſe of *A.* and his Heirs, or bargained and ſold. For the Rev'n was ſettled in the Bargainee by Operation of the Statute, and he had no Remedy to compel the Ten't to attorn. And the Law is the ſame where Land was deviſed by Will, for otherwiſe it would be in the Ten't's Power to fruſtrate the Will by refuſing to attorn.

A Diſs'in of a Manor is no Diſs'in of the Services, unleſs the Ten'ts attorn to the Diſs'or; but if they do attorn, and he die ſeiſed,

ſeiſed, the Diſs'ee can't diſtrain for the Services. But tho' the Diſs'or has gotten the Attornment of the Ten'ts, they may afterwards refuſe to perform the Services to avoid a double Charge.

323. No Man can be diſſeiſed of a Rent-Service in Groſs, but at his Election, for if a Stranger take it by Coertion of Diſtreſs, or otherwiſe, yet may the rightful Owner make a lawful Grant thereof, and the Rent ſhall paſs; or he may bring an Aſſiſe againſt the Stranger; or diſtrain the Ten't for all the Arrears, tho' the Diſs'or died ſeiſed, and tho' he has determined his Election, and admitted himſelf out of Poſſeſſion by bringing of an Aſſiſe; as a Man may enter into Land, notwithſtanding he bring an Action to recover it. And ſuch a Diſs'ee may releaſe to the Wrong-Doer, becauſe thereby he admits himſelf out of Poſſeſſion; but one can't be diſſeiſed by a bare Attornment of the Ten't to a Stranger.

324. If a Man make a Gift in T. or a Leaſe L. or Y. of Part of the Demeſnes, and afterwards be diſſeiſed of the Manor, and all the Ten'ts, and the Donees or Leſſees attorn, and after Diſs'or die, *&c.* yet may Diſs'ee diſtrain on the Land given or let, for as long as the Poſſeſſion continues in Donee or Leſſee, ſo long the Rev'n, and Rent incident thereto, remain in Donor or Leſſor, and the Deveſting or Reveſting of the particular Eſtate deveſts or reveſts the Rev'n.

If the Lord of a Manor leaſe Part of the Demeſnes, the Rev'n thereof continues Par-

cel

el of the Manor, and ſhall paſs by the Grant thereof; but if he make a Leaſe L. of the whole Manor, excepting *B.* Acre, Parcel of the Demeſnes, and then grant away the Manor, *B.* Acre ſhall not paſs, for being in Poſſeſſion it cannot be Parcel of the Rev'n expectant on a State of Freehold; but if the Lord had only made a Leaſe Y. of his Manor, excepting *B.* Acre, it ſhould paſs by the Grant of the Manor. 325.

Of Diſcontinuance.

DIſcontinuance of an Eſtate in Lands properly ſignifies an Alienation by Ten't T. or one ſeiſed *in auter droit*, whereby the Iſſue in T. Heir, or Succeſſor, *&c.* are driven to their Action, and cannot enter. It may be done by 5 Sorts of Conveyances, *viz.* Fine, Recovery in a *Præcipe*, Feoffment, Releaſe or Confirmation with Warranty.

Sometimes the Word Diſcontinuance is taken for the Plaintiff's *ſuffering the Defendant to be out of Court, by neglecting to continue the Cauſe, which in an uninterrupted Series muſt be done from Day to Day till the End of the Suit*, and *(a)* this is not ſaved by the Defendant's Appearance, as Miſcontinuance is, *i. e.* when one Proceſs is awarded inſtead of another, or a Day given which is not legal. (a) Q. 1 Syd. 173.

At Law the Alienation of Abbot, or Biſhop, without Aſſent of Covent or Chapter, was a Diſcontinuance to the Succeſſor, but if the Covent or Chapter had aſſented, ſuch Alienation had been good for ever.

A Huſ-

326. A Husband might diſcontinue his Wife's Eſtate before 32 *H.* 8. 28. but by that Statute a Husband ſeiſed in the Wife's Right or jointly with her, of any Freehold or Inheritance, can't diſcontinue it, either by Feoffment, (whether made by him alone or jointly with her,) or by ſuffering a Recovery without Voucher.

(*a*) Contra Moor 28. It is (*a*) ſaid that, if after the Husband has aliened they be divorc'd *Cauſa Præcontractus*, ſhe may enter in his Life.

But this Statute ſaves not the Wife from being barr'd by Non-claim on a Fine levied by the Husband within 5 Years after his Death; nor does it give the Heir an Entry during the Husband's Life on the Husband's Alienee having Iſſue by his Wife, which would have given him a Title to have been Ten't by Curteſy, if he had not aliened. If the Husband alien Land whereof they are ſeis'd in ſpecial T. not only the Entry of the Wife is ſav'd, but likewiſe that of the Iſſue and Rem'r Man. Nor can he diſcontinue a Rem'r in the Wife expectant on a State of Freehold in himſelf.

But any other Ten't T. (except a Woman claiming from her Husband,) may ſtill by Feoffment, *&c.* diſcontinue his own Eſtate and the Rev'n or Rem'r depending on it; in Reſpect of the Privity between Ten't T. and the Iſſue, and thoſe in Rev'n and Rem'r and becauſe an Entry would defeat the Warranty intended to be annex'd to the Feoffment, *&c.* and after *W.* 2. which reſtrain'd Ten't T. from aliening, he was con-

ſtrued

rued to have ſuch Power as the Law gave 327.
thoſe ſeis'd in Fee *in auter Droit*, whoſe
eoffments were voidable by Action only,
heir Conveyances of Things in Grant were
oidable by Action or Claim, *&c.* and
heir Grants of a Thing not *in Eſſe* before
ere meerly void by their Death.

None can make the Diſcontinuance lar-
er than the Alienation by Ten't T. made
; therefore if *A.* Ten't T. make a Gift in
. to *B.* and *B.* enfeoffs *C.* and die without
ſue, *A.*'s Iſſue may enter.

He, that claims by Title Paramount above
he Diſcontinuance, may enter.

Since 11 *H.* 7. 20. if a Woman ſeis'd in Co. Lit.
. jointly or ſolely, of Land, *&c.* of the 326. b.
heritance, or Purchaſe of the Husband,
given to the Husband and Wife by his
nceſtors, or any ſeis'd to the Uſe of him
his Anceſtors, diſcontinue, he to whom
he Right after her Deceaſe ſhould apper-
in, may enter.

Ten't T. may have a †*quod Permittat*, a
Writ of Cuſtoms and Services in the *Debet*
Solet, not in the *Debet* only, *Admeaſure-
ent*, *Nativo Habendo*, Eſcheat, *Conſimili
caſu*, *Ceſſavit*, Waſte. But not of
ight *ſur Diſclaimer*, *quo Jure*, *ne injuſte
exes*, *nuper Obiit*, *rationabili Parte*, *Mort-
nceſtor*, or *ſur cui Vita*, for theſe Writs
nly lie for Ten't in Fee-ſimple.

A Feoffment made by Ten't in T. is a 328.
Diſcontinuance, with or without Warran-
y; but a Releaſe or Confirmation is not,
or a Man can paſs no more thereby than he
may

† lies for a diſſeiſin of common of Paſture, where
may it lye.
* lies where a Woman
is endowed by the Father or
Guardian durante
the nonage.
‡ lies for a recovery
of a Villein or Baſtard.
* lies where a Tenant
has neglected paying
his Rent for two years
by Eſtate in no ſuch
Diſtreſs is found.

may lawfully paſs; but Warranty added to a Releaſe or Confirmation to a Diſſ'or works a Diſcontinuance, if it deſcend on him that Right has; but if one having a Son marry a 2d Wife, and Land be given to the Husband in ſpecial Tail, and he have Iſſue by his ſecond Wife, and be diſſeiſed, and releaſe with Warranty and die, or if Ten't in T. of *Burgh Eng.* Land have Iſſue two Sons, and be diſſeis'd and releaſe with Warranty to the Diſſ'or and die, yet is not the Entail diſcontinued in either Caſe, becauſe the Warranty always deſcends to the Heir at Law.

329. If an Abbot be diſſeis'd and releaſe with Warranty and die, or reſign, the Succeſſor may enter. The Privation or Tranſlation, *&c.* of a Biſhop, is all one with his Death, as to any Act tending to the Diminution of the Revenues, but not as to others; therefore if being Patron and Ordinary he confirm a Leaſe by a Parſon without Dean and Chapter, and then the Parſon die, and he collate another, and be afterwards tranſlated, the Confirmation remains good *during* Dy. 356. p. 42. *the Lives of the Biſhop and the Succeſſor of the Incumbent, who found the Land charged.*

The Releaſe of an Husband ſeis'd in his Wife's Right to a Diſſ'or with Warranty never was a Diſcontinuance to the Wife, unleſs ſhe were his Heir.

If Ten't T. releaſe in Fee to his Leſſee Y. or confirm his Eſtate in Fee, yet does he not diſcontinue the Entail, for no more paſſes by a Releaſe or Confirmation than lawfully may

nay. Therefore if Leſſee L. make a Leaſe Y. and afterwards make a Releaſe or Con-rmation in Fee to the Leſſee, yet does he ot forfeit his Eſtate. But if Ten't T. make eoffment with Livery, he diſcontinues the Entail; and if a Leſſee make ſuch a Feoff-nent, he forfeits his Eſtate. Notwithſtand-ng ſuch a Feoffment made by Leſſee L. be Forfeiture of his Eſtate, and a Diſs'in of he Leſſor, yet between the Parties it is a ood Feoffment, and a Warranty may be nnex'd to it. 330.

If Ten't T. make a Leaſe for his own ife, and then make a Releaſe in Fee to he Leſſee, he does not at all enlarge his Eſtate thereby. And if Ten't T. grant his hole Eſtate to *A.* and his Heirs, with Li-ery, yet nothing but for his own L. paſſes s to the Iſſue, (*in whoſe Election it ſhall be look on the Eſtate of the Grantee as void or oidable, tho' as long as it continues not defeat-d, it be an Inheritance in the Grantee, and his Wife ſhall be endowed*, &c.) but as to the Ten't himſelf, the Tail is in Abeyance, nor an he after bring Waſte. That Ten't T. an't make a rightful Eſtate larger than for is own L. appears for that a Diſcontinu-nce is a Wrong to him in the Rev'n, and he Diſcontinuee is a *Deforceor*, and ſo call'd n *Formedon*. 331. 1 Saund. 26. 3 Rep. 84. b.

Deforcement is any wrongful With hold-ng of Land from the rightful Owner.

Of Things that lie in Grant there can be o Diſcontinuance; therefore if Ten't T. of Rent, Advowſon, Common, or Rem'r or Rev'n expectant on a Freehold, make a Grant 332.

Grant by Deed or Fine, or diſſeiſe the Ten of the Land out of which the Rent is iſſu ing, whereof he is ſeis'd in T. and make Feoffment with Warranty, yet does he no diſcontinue the Entail. But if Ten't T. Land make a Leaſe Y. and levy a Fine, thi is a Diſcontinuance, for a Fine is the Feoff ment of Record, and the Freehold paſſe And if Ten't T. grant a Rent or Rem'r with Warranty, and the Iſſue bring a *Formedon* and admit himſelf out of Poſſeſſion, h ſhall be barr'd by the Warranty and Affets.

In the Manner to bar Tenant by Curtesy lies for a Rent granted by Deed, which might have been granted by Fine.

Neither Exchanges, nor Letters Patent work a Diſcontinuance, becauſe they do no require Livery of Seiſin.

333. If Ten't T. make a Leaſe for Life of th Leſſee, he diſcontinues the Entail durin the Life of the Leſſee, and gains a ne Rev'n in Fee, and if he after grant thi Rev'n in Fee, and Leſſee die, or ſurrende or forfeit in the Life of Ten't T. this is Diſcontinuance in Fee, becauſe the Grante was ſeiſed in Demeſne as of Fee, in the Li of Ten't T. by Force of his Grant; but Ten't T. die before the Grant in Fee be e ecuted by the Death, *&c.* of Ten't L. t Diſcontinuance determines upon the Dea of Ten't L. tho' the Grant were with Wa ranty, (*which being annexed to an Eſtate p ſing by Grant, cannot bar the Entry of the I ſue, becauſe the Eſtate to which it is annex is void at his Election.*) If a Fine be levi to Ten't T. and he grant and render t Land to another in Fee, and die before E ecution, there is no Diſcontinuance at a

by Wrong, by a Diſſeiſor of Tenant in Tail gives me.

if he make a Feoffment of a Part of a anor whereof he was ſeiſed in Fee, and nex the Advowſon appendant by Deed, d die before the Grant of the Advowſon executed, by Preſentation and Inſtitution a Clerk of the Grantee upon the next voidance, the Entail of the Advowſon is t diſcontinued. If he make a Gift in T. *B.* and then releaſe to *B.* and his Heirs, d die, and then *B.* die without Iſſue, the iſcontinuance determines; becauſe the E- te, which paſſed by Livery only, cauſed Diſcontinuance, and the Grant of the e was not executed in the Life of Ten't and if Ten't T. make a Leaſe L. and n grant the Rev'n in Fee to *A.* who nts it to *B.* and then Ten't L. die, whereby Fee is executed in the Life of Ten't T. the Diſcontinuance determines by the ath of Ten't L. becauſe the Fee was not cuted in the Grantee of Ten't T. And Ten't T. make a Leaſe L. and then grant Rev'n in Fee, and the Grantee die with- Heir, during the Life of Ten't L. and Rev'n eſcheat, and the Ten't L. die, Diſcontinuance is determined; but if Rev'n had been executed in the Grantee re the Eſcheat, the Diſcontinuance had ained. Litt. Sect. 642.

A Leaſe Y. by Ten't T. cauſes no Diſcon- 334.
uance, and the Rev'n on ſuch Leaſe de- ds to the Iſſue in T. but the new Rev'n ee gained by Operation of Law upon making of a Leaſe L. deſcends to the general. A Deviſe by Will is no Diſ-

continuance,

continuance, nor is a Leaſe for 3 Lives ac-
Co. L. 333. a. cording to the Statute, to which every one is Party, and therefore no one can be wronged by it.

If Husband and Wife at Law had by Deed joined in a Leaſe L. of the Wife's Land, this had been a Diſcontinuance of the Freehold, and yet the Rev'n remained in the Wife; but if the Husband alone had made the Leaſe, the Rev'n had been in the Husband.

335. If Donee infeoff his Donor, or Rem'r Man, this is no Diſcontinuance, becauſe the Rev'n is not diſcontinued, for which Cauſe when the Rev'n is in the K. there can be no Diſcontinuance; but ſuch an Entail the Rev'n whereof is in the K. might be barr'd by Fine or Common Recovery, before 34 *H.* 8. 20. but K.'s Rev'n could never be barred by any Act of the Ten't T.

If there be an intermediate Rem'r in Tail, a Feoffment made to him in Rev'r by Ten't T. is a Diſcontinuance; and if Ten't T. infeoff the Donor and a Stranger, this is a Diſcontinuance of the whole Land.

If Leſſee L. make a Leaſe for his own L. to the Leſſor, Rem'r to him and a Stranger in Fee, this enures as a Surrender for the one Moiety, and a Forfeiture for the other. *ſed Q. How the Eſtate L. can be forfeited by a Deed which the Leſſor agrees to?* But if one Jointenant infeoff his Companion and a Stranger, this veſts his Moiety in the Stranger only, for as to his Companion the Livery is void.

If Husband of Leſſee L. make a Feoffment in Fee, and Leſſor enter for the Forfeiture, this was a Diſcontinuance at Law of the Wife's Freehold, and yet the Rev'n was reveſted. *Q. How the Diſcontinuance can remain, ſince the Eſtate which paſs'd by Livery, and was the only Cauſe of the Diſcontinuance, is defeated by the Entry of the Leſſor?*

Alſo ſome Diſcontinuances are for Life only; as when Ten't T. makes a Leaſe for 336.
Leſſee's L. ſome are during the Limitation of a State T. as when Ten't T. makes a Gift in T. but if he make a Leaſe Y. or L. Remainder in Fee with Livery, this is a Diſcontinuance in Fee, becauſe the State in Fee paſſes by the Livery.

When the Eſtate that caus'd the Diſcontinuance is defeated, the Diſcontinuance is defeated alſo; as if the Husband had made Feoffment of his Wife's Land on Condition and died, and his Heir had entered for Breach of the Condition, the Wife might enter; for the Heir enter'd in reſpect of the Title by Force of the Condition which deſcended on him, not in reſpect of any Right, *and the Law will not adjudge the Heir to gain a wrongful Eſtate when he does nothing but what he lawfully may:* Therefore his Eſtate preſently vaniſhes away, and veſts in the Wife without any Entry or Claim by her.

Even at Law, if the Husband within Age had made a Feoffment of his Wife's 337.
Land, and died, his Wife might have enter'd, for he, if he had liv'd, might have enter'd, but not in his own Right, but in hers; there-

therefore ſuch Right remains to her after his Death; for it is hard that the Husband's Feoffment, which would not take away his own Entry, ſhould take away hers; but the Husband's Heir in ſuch Caſe could not enter, becauſe no Right nor Title deſcended to him; and if an Infant being Ten't *pur autre Vie* make a Feoffment, he can't enter after the Death of *ceſtuique Vie*, becauſe then he has no Right at all remaining in him. If Baron and Feme being both within Age join in a Feoffment by Indenture of the Wife's Land, reſerving Rent, and he die, ſhe may have a *dum fuit infra Ætatem*; but if he were within Age, and ſhe of full Age, ſhe ſhall not.

If two Infants being Jointenants make a Feoffment, and one die, the Right ſurvives, becauſe they might have join'd in a Writ of Right, and the Survivor may enter into the whole, but they can't join in a *dum fuit infra Ætatem, becauſe that Action is grounded on the Nonage of the Demandants, which is ſeveral*; for the Nonage of the one is not the Nonage of the other. But if one of them only had made a Feoffment *of his Moiety*, the Jointure had been ſevered while the Feoffment had remain'd in Force, and conſequently there could have been no Survivor; *but if he had made a Feoffment of the whole Land, and died, the Right would have ſurvived, becauſe they might have join'd in a Writ of Right.* If one Jointenant be within Age, and the other of full Age, and they join in a Feoffment, and he of full Age die, the Infant ſhall recover but a Moiety.

(a) 8 Rep. 43. a.

No

Not only the Heir general ſhall take Advantage of the Nonage of the Anceſtor, but alſo a ſpecial Heir; as the Heir by the Cuſtom of *Burgh-Eng.* or Heir in ſpecial T. tho' he be not Heir at Law. If the Huſband had made a Gift in T. of his Wife's Land during his Nonage, and died, not only the Wife might have enter'd, but the Heir of the Husband, in reſpect of the new Rev'n in Fee, *created by Conſtruction of Law upon the making of the Gift in T.* but his Eſtate preſently vaniſhes. If an Infant Ten't T. had made a Feoffment, and been attainted, and died, the Iſſue in reſpect of the Corruption of Blood was put to his *Formedon.* Contra 8 Rep. 43.

338. A Woman being an Heireſs marries, and has Iſſue, the Husband dies, ſhe marries again, the 2d Husband makes a Leaſe L. of her Lands, the Wife dies, the Leſſee ſurrenders to the Husband, it ſeems that the Iſſue of the Wife may enter upon the 2d Huſband; becauſe the Eſtate L. which caus'd the Diſcontinuance is drowned and vaniſh'd by the Surrender; but after the Death of Leſſee L. there is no Doubt but the Iſſue may enter.

Surrender

A Surrender is the Yielding up of a State L. or Y. to him that has the immediate Rev'n or Rem'r, wherein the Eſtate L. or Y. may drown. A Surrender is either in Deed or in Law; a future * Intereſt for Y. cannot be ſurrender'd by Deed, but it may be ſurrender'd in Law; as if Leſſee for ten Y. to begin at *Michaelmas*, take a new

* Dyer 58. pl. 3. cont.

Leaſe, *for thereby he as much acknowledges the Leſſor's Power to make a new Leaſe, notwithſtanding his Intereſt; as if he were Ten't in Poſſeſſion, and had taken a new Leaſe,* but there can be no Surrender of a bare Right. A particular Eſtate in Things lying in Livery, which might at Law paſs without Deed, might before 29 *Car.* 2. 3. be ſurrender'd by Parol without Deed, whether it commenc'd by Deed or without; but Things that lie in Grant, or a Rem'r of an Eſtate in Land could never be ſurrender without Deed, whether the particular Eſtate began with or without Deed.

Tho' the particular Eſtate be drown'd by the Surrender, as to the Party, yet as to Strangers it continues *in Eſſe*, for *res inter alios acta alteri nocere non debet*; therefore the Rev'n be granted with Warranty, and then Ten't L. ſurrender, the Grantee ſhall not have Execution in Value againſt the Grantor during the Life of Ten't L. nor ſhall the Surrenderee, being an Infant, have his Age; nor ſhall a Rent granted by Ten't L. be avoided by the Surrenderee during the Life of Ten't for Life.

If one grant a Rent-Charge out of Land to a Biſhop, and afterwards inſeoff the Biſhop of the Land, and then the Lord enter for the Mortmain, he ſhall hold the Land diſcharg'd of the Rent, for he affirms the Alienation in Mortmain, *and claims reſpect thereof the ſame Eſtate as the Biſhop had.* But if Ten't L. grant a Rent, and ſeoff the Grantee, and Leſſor enter for

Forfeit

Forfeiture, the Rent is reviv'd, *for the Leſſor re-entring, defeats the Eſtate of the Alienee, the Making whereof deveſted his Rev'n, and claims ſuch Eſtate as his Ten't had before the Alienation which was liable to the Rent.* The Grant of a Rev'n for L. makes the Waſte diſpuniſhable; but if the Grantor releaſe to the Grantee and his Heirs, the Waſte becomes puniſhable again.

The Eſtate ſurrender'd is *in ſome Reſpects* abſolutely drown'd for a Stranger's Benefit, and a Leaſe or Grant by him in Rev'n ſhall after ſuch Surrender take Effect preſently. *A.* makes a Leaſe L. reſerving 40*s.* Rent, Rem'r to *B.* and then grants the Rev'n in Fee to *B.* and *A.* attorns, *B.* ſhall not have the Rent: *But this ſeems not to be Law, for tho' the Eſtate ſurrender'd, in ſome Reſpects is look'd upon as ſubſiſting, leſt a Stranger ſhould be wrong'd by the Surrender, yet what Wrong can it be to him in the Caſe to pay the Rent originally reſerv'd?* Lit. Sect. 575.

If Leſſee Y. of Land in his own Right take a Wife ſeis'd of the Freehold, or become Parſon of the Church, *&c.* to which the Freehold belongs, his Term for Y. is drown'd; for a Man can't at the ſame Time have the Freehold, and a Leaſe Y. in the ſame Land; but the greater Eſtate drowns the leſs: Yet if a Man marry his Leſſee Y. the Term for Y. remains; *for the Wife, in whoſe right he was poſſeſs'd thereof, has nothing to do with his Freehold, and the Law, in Favour of the Wife, will preſerve her Leaſe.* If Leſſee of a College be made Head thereof, this

drowns not the Leaſe Y. *becauſe the Freehold veſts not in him, but in the Corporation.*

339. None can diſcontinue a State T. *&c.* unleſs he once were ſeis'd by Force of the Tail, *&c.* unleſs it be in reſpect of a Warranty; which being made to a Feoffee, or Diſſ'or, and deſcending to the Heir, had the Effect of a Diſcontinuance, in taking away the Entry of the Heir, *before* 4 & 5 Annæ 16. *by which all Warranties made by them who have no Eſtate of Inheritance in the Land*, &c. *ſhall be void againſt the Heir.* And where no greater Eſtate paſſes than for L. of Ten't in T. as in Grants of Rev'ns, *&c.* a Warranty added, whether by Ten't T. or any other Anceſtor, never cauſed any Diſcontinuance.

340. But ſuch Feoffments and Grants made by them, who never were ſeis'd by Force of ſuch Eſtates, are good againſt the Grantors during their Lives.

341. An Alienation by Parſon or Vicar of the Land of the Church never was a Diſcontinuance, for theſe have not the Right of the Fee in 'em; but the Fee remains in Abeyance, *i. e. in conſideratione Legis*, and *non in homine adtunc ſuperſtite:* When a Leaſe L. is made, Rem'r to the right Heirs of *J. S.* then living, the Fee is in Abeyance during the Life of *J. S.* So the Freehold of the Glebe is in Abeyance during the Vacancy of a Parſonage: And ſo is the Freehold of the Land of a Biſhoprick during a Vacancy; and the Freehold of Land given to *A.* for *B.*'s Life, was in Abeyance, by the Death of *A.* till an Occupant enter'd.

Co. L. 342. b.

Vide ſupra 59.

But a Parſon, Vicar, Archdeacon, Prebend, *&c.* are eſteem'd in ſome Caſes to have a Fee qualified for the Benefit of the Church, for they may have a Writ of Waſte, or Entry in *conſimili Caſu*, or *ad communem Legem*, or *ad terminum qui præteriit*; or a *quod permittat*, or a *contra formam Feoffamenti*, or a Writ of Meſne; none of which Writs Tenant L. can have. But a Leaſe Y. made by them is void by their Death, and they ſhall have Aid of Patron and Ordinary, ſo that to ſuch Purpoſes they have but a State L. 341. *b.*

But a Biſhop, Abbot, Dean, and Maſter of an Hoſpital, ſeeing the Fee and Right was in 'em, and they might maintain a Writ of Right, might at Law diſcontinue the Land whereof they were ſolely ſeis'd. But they ſhall not have Aid, in reſpect of their high Eſtate, except a Dean collative by K. who ſhall have Aid of him.

It has been reſolved, that no Lay Hoſpital is within the 31 *H.* 8. of Monaſteries, but only thoſe that were Religious and Eccleſiaſtical; and tho' it were ordain'd, on the Foundation or after, that divers Prieſts ſhould be maintain'd in it, to celebrate Divine Service to the Poor, and pray for Souls, yet ſuch Hoſpital is Lay; and no Hoſpital came to the Crown by 1 *Ed.* 6. whether Lay or Religious. 342.

Nor will it follow that a Parſon, *&c.* hath a Fee, becauſe the Grant of an Annuity by Parſon, confirm'd by Patron and Ordinary, or made by Patron in Vacation, and confirm'd by Ordinary, or made by 343.

Parſon, having *quid pro quo*, and confirm'd by Ordinary only, would at Law bind all Succeſſors for ever: For it is a Maxim, that of all Land there is a Fee, either in ſome Perſon, or in Abeyance; and that every Land in Fee may be charged with a Rent in Fee one Way or other; and ſuch Grant is good, becauſe made by all that have Intereſt: But where the Fee is not perpetually in Abeyance, but may every Hour poſſibly come *in Eſſe*, it can't be charg'd till it come *in Eſſe*; as when a Rem'r is given to *A.*'s Heirs, it can't be charged in *A.*'s Life.

A Grant of Rent by Ten't T. ſhall never be avoided, if the Entail be cut off: Nor ſhall his Iſſue avoid it, if it be granted to one whom the Donor diſſeis'd in Conſideration of a Releaſe of his Right. Where one has 13 Acres in a Meadow of 80. yearly to be ſet out, and grants Rent out of thoſe 13 Acres generally, lying in the Meadow of 80. without mentioning where they lie particularly; there, as the State removes, the Charge ſhall remove.

Vide ſupra 6, 80.

344. Not only a Prebend, Chantery, and Chapel, but alſo a Church Parochial may be Donative, and exempt from all ordinary Juriſdiction, and the Incumbent ſhall reſign to the Patron, and he ſhall be viſited by him only, but he muſt be an able Clerk *infra ſacros Ordines*; and if he be diſturb'd the Patron ſhall have a *Quare Impedit*, and the Writ ſhall ſay, *Quod permittat ipſum præſentare ad Eccleſiam*, and the Declaration ſhall ſhew the Special Matter. No Lapſe ſhall

hall incur to the Ordinary on the Patron's
eglecting to collate, except it be ſo ſpeci-
lly provided in the Foundation: *But the* Yelv. 61.
Ordinary may compel him to fill the Church by
Church-Cenſures. One Preſentation by the
atron, and Inſtitution thereon, make it
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dis Eccleſiæ cum curâ animarum, & accipe cu-
am tuam & meam. But it is ſaid, that every
nſtitution implies that the Perſon inſtituted has
he Cure of Souls, tho' the Words, Accipe cu-
am tuam & meam, *are not in the Inſtrument*
f Inſtitution, and tho' the Parſon has a Vicar
ndow'd. A Church is full by Inſtitution 1 Syd. 427.
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Vide ſupra 6, 80.

344. Not only a Prebend, Chantery, and Chapel, but alſo a Church Parochial may be Donative, and exempt from all ordinary Juriſdiction, and the Incumbent ſhall reſign to the Patron, and he ſhall be viſited by him only, but he muſt be an able Clerk, *infra ſacros Ordines*; and if he be diſturb'd, the Patron ſhall have a *Quare Impedit*, and the Writ ſhall ſay, *Quod permittat ipſum præſentare ad Eccleſiam*, and the Declaration ſhall ſhew the Special Matter. No Lapſe

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ſhall incur to the Ordinary on the Patron's neglecting to collate, except it be ſo ſpecially provided in the Foundation: *But the Ordinary may compel him to fill the Church by Church-Cenſures.* One Preſentation by the Patron, and Inſtitution thereon, make it preſentable for ever. But Preſentation by a Stranger, and Inſtitution thereon, are void. Yelv. 61.

Biſhopricks at firſt were donative *per Traditionem baculi & annuli:* K. *John* granted that they ſhould be eligible. A Church, Hoſpital, or Free Chapel, founded by K. without any ſpecial Exemption, is viſitable by the Chancellor only; and K. may licence a Subject to found ſuch Church, *&c.* and ordain that it ſhall be donative, and viſited by the Founder.

Admiſſion is, properly, when the Biſhop admits one examined by him to be able; ſometimes it is taken for Inſtitution; as where it is ſaid, *Cujus preſentatus ſit admiſſus*, i. e. *Inſtitutus.* Inſtitution is when the Biſhop ſays theſe Words, *Inſtituo te rectorem talis Eccleſiæ cum curâ animarum, & accipe curam tuam & meam. But it is ſaid, that every Inſtitution implies that the Perſon inſtituted has the Cure of Souls, tho' the Words,* Accipe curam tuam & meam, *are not in the Inſtrument of Inſtitution, and tho' the Parſon has a Vicar endow'd.* A Church is full by Inſtitution againſt a Subject, but not againſt K. till Induction, for which Cauſe K. may revoke a Preſentation before Induction. 1 Syd. 427.

Whether a Church be full, ſhall regularly be tried by the Biſhop's Letters, becauſe Inſtitution is a Spiritual Act; but whether it be void, ſhall be tried by the Common Law.

At Law, Plenarty was a good Bar to a *Quare Impedit* brought by any but K. and no Clerk once inſtituted could be remov'd at the Suit of any but K. ſo great Regard had the Law to the Biſhop's Inſtitution; nor cou'd K. himſelf preſent after Induction, or remove the Clerk but by Action. And at Law an Uſurpation, even on an Infant or Feme Covert, having an Advowſon by Deſcent or Purchaſe, or on Ten't L. *&c.* put the Infant and Feme Covert, and thoſe in Rev'n, to their Writ of Right: *But by 7 Q. A. no Uſurpation ſhall drive the Patron to a Writ of Right of Advowſon.*

Uſurpation by Collation puts him that has Right of Collation out of Poſſeſſion; but one that has Right of Preſentation can't be put of Poſſeſſion by Collation, but the Collation ſhall be intended to be made by the Biſhop proviſionally till the Patron preſents, and ſhall not drive him to his *Quare Impedit.*

By *W.* 2. an Incumbent may be removed by *Quare Impedit*, teſted within ſix Months after the Plenarty; but the Incumbent muſt be named in it, or he ſhall never be removed. And at Law no Incumbent could be removed; but if the Patron had brought his *Quare Impedit* before the Church had been full, he ſhould have had a Writ to the Biſhop, and ſhould have removed any Clerk

Clerk that came in *pendente lite*, by Uſurpation; but if one who has no Right bring a *Quare Impedit*, and the rightful Patron, being a Stranger to the Writ, preſents, and his Clerk be receiv'd, he ſhall never be remov'd. Vide Watſ. 217.

If the Biſhop be named in a *Quare Impedit*, there can be no Lapſe.

If Ten't T. releaſe all his Right to a Diſſeiſor, or grant all his Eſtate to another, he *(a)* puts the Right of the Entail in Abeyance; ſo if he be attainted of Felony, and K. after Office ſeiſe the Land, or if he in Rem'r in T. releaſe to Ten't L. all his Eſtate and Right in the Land; and it ſeems that in this laſt Caſe Leſſee L. ſhall have an Eſtate for Life of Ten't T. expectant on his own Life, and in none of theſe Caſes the Grantor or Releaſor ſhall have Waſte afterwards: But tho' Ten't T. make a Leaſe for his own Life, or Ten't in Fee releaſe all his Right to his Leſſee L. he may have Waſte. *(a)* Contra 2 Rol. Rep. 505, &c.

Eſtate and Intereſt are collective Words; for if *A.* be Ten't L. Rem'r in T. to *B.* Rem'r in Fee to *A.* and *A.* grant *totum ſtatum*, or *totum intereſſe ſuum*, both his Eſtates paſs.

Right ſignifies, properly, in Writs and Pleadings, when an Eſtate is wrongfully deveſted, and turn'd to a Right; but in Conveyances it includes the Eſtate *in eſſe*; as when a Leſſor releaſes all his Right to his Leſſee and his Heirs; and in Fines the Right of the Land includes and paſſes the

Eſtate of the Land, as when *A. cognoſcit tenementa prædicta eſſe jus ipſius* B. *&c.*

Title is properly, ſome ſay, when a Man has a Cauſe of Entry, for which he can have no Action; but legally it includes a Right, and is the more general Word; a Releaſe of Right releaſes a Title; ſo *è converſo.* It often ſignifies the Means by which one comes to Land; as Fine, Feoffment, *&c.* as when 'tis ſaid, *Veniat aſſiſa ſuper titulum, i. e.* the Conveyance by which the Plaintiff claims.

346. A Feoffment by a Biſhop or Dean ſolely ſeiſed, was at Law a Diſcontinuance; but a Dean could never diſcontinue the Land whereof he was ſeiſed in Right of himſelf, and his Chapter; for of ſuch Lands he and the Chapter muſt join in Suit, and his Feoffment of ſuch Lands is a Diſs'in: But an Abbot might diſcontinue the Land of his Houſe, for all the Monks were dead in Law, and he only had Capacity to ſue, and be ſued, to infeoff, give, demiſe, *&c.*

347. A Maſter of an Hoſpital, ſolely ſeiſed, might have diſcontinued; but one ſeiſed, together with his Brethren, as a Body Politick aggregate, never could.

He in Rem'r T. diſſeiſes Ten't L. and makes a Feoffment, and dies without Iſſue, and Ten't L dies, he in Rev'n may enter; for the Rem'r Man was never ſeiſed of the Freehold and Inheritance by Force of the Tail.

Of Remitter.

REmitter is an Operation of Law upon the meeting of an old Right remediable, and a later defeaſible Eſtate in the ſame Perſon without his Folly; whereby the former is reſtored, and the later defeated: For the Law prefers a ſure Right, tho' but to a ſmall Eſtate, to a great defeaſible Eſtate. +

But there ſhall be no Remitter to bare Titles of Entry, nor can there be any Remitter but by the Deſcent of an Eſtate; therefore if an antient bare Right deſcend to one who has a later Right, yet is he not remitted. 348. +

If Ten't T. diſſeiſe his Diſcontinuee, and have Iſſue, and die, his Iſſue is remitted by the Deſcent of the Freehold in Law before he enters, tho' the Diſcontinuee be an Infant or Feme Covert.

As in the laſt Caſe there is a Remitter, where the defeaſible Eſtate and old Right deſcend together; the Law is the ſame where Ten't T. enfeoffs his Iſſue within Age, and the Right of the Entail after deſcends to the Feoffee, whether within Age, or of Age at the Time of the Deſcent; and notwithſtanding he might have waved the Eſtate gained by the Feoffment after he was of full Age, yet ſhall he be remitted, becauſe ſuch Waver would have been to his Loſs, and no Folly could be imputed to him when he took the Eſtate. Vide infra 460.

And

349. And if the Iſſue in T. infeoffed by his Father, grant a Rent or Common out of the Land, and then the Right of the T. deſcend to him, he ſhall hold the Land diſcharged; for the State which he had when he made the Grant, is utterly defeated. So if the Diſſeiſee's Heir diſſeiſe the Diſs'or, and grant a Rent, and then the Diſs'ee die, the Land is diſcharged; for the Heir is remitted, becauſe a new Right of Entry deſcends to him. Father diſſeiſes Grandfather, and grants a Rent, and dies, Grandfather dies, the Son is remitted, and ſhall avoid the Rent; *nor can the Grant in theſe Caſes enure by Way of Eſtoppel, becauſe an Intereſt paſſed from the Grantor:* But in theſe Caſes the Grantee may have a Writ of Annuity againſt the Grantor, * *and his Heirs if mentioned in the Grant*; but it ſeems that if the Iſſue in T. &c. had made a Leaſe Y. it ſhould not have been avoided by the Remitter.

Vide Lit. Sect. 693.

Co. L. 45 a.

* Co. L. 144. b.

Litt. Sect. 289.

If Ten't T. make a Leaſe L. and then grant a Rent in Fee, and Ten't L. die, yet the Rent remains; for tho' the Rev'n in Fee *gained by the Diſcontinuance* be defeated, yet becauſe the Grantor, *at the Time of the Grant*, had the Right of the Entail in him, tho' he were not then ſeiſed by Force thereof, the Rent remains good againſt him.

Co. Litt. 348. b.

At this Day if Ten't T. make a Feoffment to the Uſe of his Iſſue, and die, the Iſſue ſhall not be remitted, becauſe the Statute of Uſes ſays expreſly, That *ceſtuyque Uſe* ſhall have the Eſtate of the Land in ſuch Quality, Manner and Form, as he had the

the Uſe; but the Iſſue in T. in that Caſe may wave the Poſſeſſion, and recover in *Formedon* againſt the Feoffees; for otherwiſe the Land might be ſo far incumber'd by the Ten't T. that it would be nothing worth to the Iſſue; and tho' the Party himſelf, that comes to the Land by Force of the ſaid Statute of Uſes, cannot be remitted, yet if he die, and the Land deſcend to his Iſſue, he ſhall be remitted, for the Land comes to him as Heir by Courſe of Common Law.

The chief Cauſe of Remitter is becauſe there is no Ten't of the Freehold, but the ſame Perſon that has the Right, and he can't ſue himſelf; therefore the Law judges him to be in ſuch Plight, as if he had recovered againſt another.

There can be no Remitter to him that has an Action without Right; as the Iſſue of Ten't T. who has ſuffered a Common Recovery in which there is Error. Nor to one that has a Right without an Action; as if *B.* purchaſe an Advowſon, and ſuffer an Uſurpation, and ſix Months to paſs, and the Uuſurper grant the Advowſon to *B.* and his Heirs, and *B.* die, yet is not his Heir remitted; *for he cannot have a Writ of Right of Advowſon, becauſe neither he nor his Anceſtors ever preſented; but it ſeems that there ſhall be a Remitter in this Caſe by* 7 *Q.* A. *which gives the Patron a* Quare Impedit, *notwithſtanding an Uſurpation.* 349. b.

A Man can't be remitted to a Thing regardant, appendant, or Appurtenant, until he have re-continued the Principal, for he can

can have no Action to recover the Thing appendant, *&c.* till he have recover'd the Principal; therefore if the Diſcontinuee of a Manor to which, *&c.* grant the Advowſon to Ten't T. and his Heirs, and he die, yet is not the Iſſue remitted. But a Remitter to the Principal is a Remitter to the Appendant, tho' they were ſevered before the Remitter; as if the Diſcontinuee grant the Manor to Ten't T. and his Heirs, ſaving the Advowſon, and Ten't T. die, and the Manor deſcend to the Iſſue, he is not only remitted to the Manor, but to the Advowſon alſo: So if a Diſs'or ſuffer an Uſurpation, and Diſs'ee re-enter into the Manor to which, *&c.* he re-continues the Advowſon.

350. If Ten't in ſpecial T. have Iſſue a Daughter, and his Wife die, and he marry again, and have Iſſue another Daughter, diſcontinue, and take back a State in Fee, and die, and the Land deſcend to the two Daughters: Or if Ten't T. infeoff his Heir apparent within Age, and a Stranger, and die; or if a Diſcontinuee, after Death of Ten't T. infeoff the Iſſue within Age, and a Stranger; in all theſe Caſes there is a Remitter to no more than a Moiety, and the Iſſue in T. and the other become Ten'ts in Common.

If Ten't T. infeoff his Heir apparent of full Age, and die, the Heir ſhall not be remitted, becauſe it was his Folly to take ſuch Feoffment.

351. If Ten't T. infeoff a Woman of the Land entail'd, and die, and his Iſſue being within

Age

Age marry the Woman, he is presently remitted by the Freehold in the Wife's Right, which he gains by the Intermarriage; and yet the Freehold in the Wife's Land, given by Marriage to the Husband, is so uncertain, that it shall be lost by the Wife's Attainder before Issue had, and consists so much in Privity, that by the Attainder of the Husband for Felony, the Lord gains but a Pernancy of the Profits during the Coverture, and the Freehold remains in the Wife.

The Husband is possess'd of all his Wife's Chattels real in her Right, and if he survive her, he shall have them by Gift of Law in his own Right; and he may grant, demise, forfeit, or sell 'em in his Wife's Life, but he can't dispose of 'em by Will: The Wife surviving him, shall avoid a Rent-Charge, *&c.* granted by him, but not a Demise made by him for Part of the Term.

It seems that such a Chattel of the Wife's may be sold by the Sheriff in the Wife's Life, on an Execution of a Judgment in Debt against him.

Chattels real or personal which the Wife has *in autre Droit*, as Executrix or Administratrix, shall not survive to the Husband: And if she grant a Term to her Use before the Coverture, or have a meer Possibility, the Husband surviving her shall not have it, but her Executors or Administrators.

If she be dispossessed of a Term before Marriage, or have a Right to any Chattel real or personal, or have an Action of Debt on a Bond, the Husband shall have

no

no Benefit of 'em unleſs he recover during the Coverture.

But the Husband ſurviving ſhall have ſuch Chattels as are partly in Poſſeſſion, and partly in Action, which happen during the Coverture, as Arrears of Rent of any Kind, becoming due after the Marriage; but he could not recover any Arrears due to the Wife before the Coverture, until 32 *H.* 8. and they ſhall remain with the Wife ſurviving the Husband, whether due before or after Marriage.

Vide ſupra 251.

If a Church become void during the Coverture, he ſhall have a *Quare Impedit* in his own Name, as ſome hold; but if the Wife ſurvive, ſhe ſhall preſent, and the Huſband, if he ſurvive, ſhall preſent to a Church void during the Coverture, but not to one void before.

The Wife's Chattels Perſonal in Poſſeſſion, are abſolutely given to the Husband by the Marriage.

But if he die before he ſeiſes an Eſtray in her Manor, ſhe ſhall have it, for there was no Property in her before Seiſure. Where ſhe has but a bare Poſſeſſion; as if ſhe find Goods, or they be bailed to her, or ſhe be Executrix to a Bailee, and marry, Detinue muſt be brought againſt the Husband and Wife.

352. If the Husband make a Feoffment of the Land whereof the Wife is ſeiſed in Fee, and the Feoffor let the ſame to the Husband and Wife for their Lives, this is preſently a Remitter to the Wife as to the whole Land, for ſhe cannot be remitted to a Moiety only, becauſe

because there are no Moieties betwixt Husband and Wife, and no Folly shall be adjudged in the Feme Covert for taking back the Estate L. for it shall be adjudg'd the Act of the Husband, and not of the Wife; and the Law is the same, tho' the said Lease were by Indenture, or by Grant and Render in a Fine; and yet if the Lessor bring an Action of Waste against the Husband and Wife, the Husband shall be estopp'd to shew the said Matter against his own Act in making such Feoffment, and taking back the said Lease L. but if he make Default at the grand Distress, and the Wife be receiv'd, she may plead all the said Matter, and bar the Lessor, for a Wife receiv'd for the Husband's Default, shall have the same Advantage in Pleading as if she were Sole, and in 353.
some Cases more; as if she be receiv'd in Assise, and vouch a Record, and fail thereof *at the Day given to bring it in*, she shall W. 2. 25.
not be adjudged a Diss'or, *which would make her liable to double Damages, and a Year's Imprisonment, for the Law pities the Weakness of a Woman unassisted by her Husband in making her Defence.* So if she alone levy a Fine executory, and in a *Scire Facias* against her and her Husband she be received on his Default, she shall bar the Conusee, which if sole, she could not do. *For since the Husband, if he had appeared, might have barr'd the Conusee, the Wife on his not appearing shall* Co. L. 46. a.
plead the same Matter.

When the Husband levies a Fine of the Wife's Land, and the Conusee grants and renders

renders to 'em both, the Wife not being Party to the Original, nor Conuſance, can take no good Eſtate, but by Way of Rem'r, yet ſhe does take a preſent Eſtate voidable, for if it were void it could not work a Remitter. The Reaſon why the Wife ſhall not be concluded by taking the State by Fine is, for that ſhe is not examined where. In the Fine ſhe only takes an Eſtate, but where ſhe parts with any Right ſhe is to be examined, becauſe thereby ſhe ſhall be barr'd for ever. Therefore if the Husband and Wife Ten't in ſpecial T. levy a Fine, and take back a State in Fee, ſhe ſhall not be remitted againſt the Fine levied by her, but the Iſſue ſhould, before 4 *H.* 7. 24, *&c.*

Co. L. 352. An Eſtoppel is where a Man by his own Act or Acceptance is concluded to alledge the Truth; it may be, 1ſt, By Record; as Letters Patents, Fine, Recovery, Plea, Taking of a Continuance, Confeſſion, Imparlance, Warrant of Attorney, Admittance. 2d, By Matter in Writing; as an Indenture, or Deſeaſance, or an Acquittance by Deed indented, or Poll. 3d, By Matter in *Pais*; as Livery Entry, Partition, Acceptance of Rent, or Acceptance of an Eſtate; as in the Caſe above, where the Husband accepts an Eſtate from his Feoffee, for the Life of himſelf and his Wife.

As to Eſtoppels obſerve theſe Rules.

1. They ought reciprocally to bind both Parties, therefore, regularly they extend not to Strangers; but Privies in Blood, as the Heir; Privies in Eſtate, as the Feoffee, Leſſee, *&c.* Privies in Law, as the Lord by Eſcheat,

cheat, Ten't in Dower, or by Curteſy, Incumbent of a Benefice, and others that come under *the Eſtate of him, that was Party to the Act which Cauſes the Eſtoppel*, ſhall be bound and take Advantge thereof; and a Rebutter is a Kind of Eſtoppel.

2. *That which cauſes* the Eſtoppel, ought to be certain to every Intent, *and directly contradictory to the Matter which it concludes a Man to alledge*; nor is it ſufficient that it *may* be *proved ſo* by Argument. Vid. ſupra 77.

3. It muſt be by ſomething preciſely affirm'd, therefore what is ſpoken Imperſonally, or by Way of Rehearſal, ſhall never work an Eſtoppel.

4. A Matter alledged that is neither traverſable nor material, ſhall not be an Eſtoppel; *for it would be hard to take from a Man his Right, for want of Caution in his Expreſſions of Matters of ſo little Conſequence.*

5. Regularly a Man ſhall not be concluded by Acceptance *of Rent, &c.* before his Title, *in Reſpect whereof he might defeat the Eſtate whereon it was reſerved*, is accrued to him, *for a Man cannot be ſaid to wave what he has nothing to do with.*

6. Eſtoppel againſt Eſtoppel puts the Matter at large.

7. Matter alledged by Way of Suppoſal in Counts, ſhall not conclude the Plaintiff after Nonſuit, *becauſe it is not preciſely alledg'd by him, and by ſuffering a Nonſuit, he ſhews that he doth not inſiſt on the Truth of it*; but it is otherwiſe after Judgment given; and all other Pleadings of either Party, which

which are preciſely alledg'd, ſhall conclude after Nonſuit.

8. Where the Truth appears in the ſame Record, the adverſe Party is not eſtopped to alledge it. Therefore, tho' a Fine levied without an Original be only voidable, yet if an Original be brought, and a Retraxit entered, the Fine levied afterward is void, becauſe the Truth appears of Record. A Church is appropriated to a Biſhop and his Succeſſors, after the Death of an Incumbent, the Biſhop by Indenture makes a Leaſe Y. of the Parſonage to begin after the Incumbent's Death; this never was any Eſtoppel, *becauſe it appears in the Demiſe it ſelf, that the Biſhop could have no Eſtate in Poſſeſſion, or Rev'n, of the Parſonage, during Life of the Incumbent, who was ſeiſed thereof in Fee at the Time of the Leaſe, and therefore it muſt needs be void.*

9. All Strangers ſhall take Benefit of Records which run to the Diſability or Legitimation of a Man's Perſon; as Outlawry, Attainder, *&c.* and *Biſhop's Certificate of* Profeſſion, Excommunication, Baſtardy, *&c.*

If the Biſhop certify a Baſtard Eigne to be a Mulier, the adverſe Party may conſeſs and avoid, by alledging the ſpecial Matter.

If Ten't T. diſcontinue, have Iſſue a Daughter, and die, and the Daughter marry, and the Diſcontinuee make a Leaſe to Husband and Wife, ſhe is remitted, tho' ſhe were of full Age when ſhe married, for Remitter is favoured in Law; but if a Feme

Feme Diſs'ee take a Husband, a Deſcent caſt takes away her Entry.

If Husband and Wife be Ten'ts in ſpe- 354.
cial T. and he diſcontinue and take back a State L. to himſelf, and his Wife, both of them are remitted maugre the Husband; for there being no Moieties between 'em, ſhe muſt be remitted to the whole, or not at all, and ſhe can't be remitted unleſs he be remitted alſo.

As the Diſcontinuance or Deveſting of the particular Eſtate diſplaces all Rev'ns and Rem'rs expectant thereon, ſo the Recontinuance of the particular Eſtate reveſts the Rev'ns and Rem'rs, and defeats all defeaſible Eſtates in the ſame Land, not only out of a common Perſon, but alſo K. himſelf; as if *B.* be Ten't T. with Rem'r to *C.* and diſcontinue, and take back a State in T. with Rem'r to K. by Deed inroll'd, and die, his Iſſue being remitted, the Rem'r is reveſted in *C.* and the Law is the ſame where Land is recovered by good Title againſt Ten't T. or L. where the Rem'r is in the K. but a tortious Entry, or falſe, or feign'd Recovery, ſhall never deveſt a State out of the K.

But if there were Ten't L. Rem'r in T. to *B.* Rem'r in Fee to *C.* and Ten't L. had been diſſeis'd, and a collateral Anceſtor of *B.* had releas'd to the Diſs'or with Warranty, *before* 4 & 5 *Annæ* 16. and died, and Ten't L. had entered, yet ſhould not *B.* be remitted to the State T. *becauſe his Right to it was Remedileſs, while the Warranty continued in Force*, therefore the Diſs'or had a Fee

Fee determinable on *B.*'s dying without Iſſue, and the Rev'n was reveſted in *C.*

If a Fine *Jur' grant* and *rend'* be levied for L. or T. with Rem'r over, the Execution of the firſt State executes the Rem'r.

355. If Feme Leſſee L. loſe by Default in a feign'd or falſe Action, the Leſſor's Rev'n is deveſted, and he can't bring Waſte *while the Recovery continues in Force*; but if the Feme marry, and the Recoverer make a Leaſe L. to the Husband and Wife, the Wife is remitted, and the firſt Leſſor alſo, and then he may have an Action of Waſte. But if the Recoverer bring Waſte againſt the Husband and Wife, the Husband has no Remedy but to make Default, and ſuffer the Wife to be receiv'd. The Cauſe why the Wife is remitted in this Caſe is, for that ſhe may have a *quod ei deforceat* againſt the Recoverer, by *W.* 2. 4. which gave this Writ to Ten't L. and T. loſing by Default, but at Law her Right was Remedileſs, and conſequently ſhe could not be remitted.

356. *a.* By the Equity of the ſaid Statute, if the Wife be Leſſee L. and the Husband and Wife loſe by Default, they ſhall have a *quod ei deforceat*, tho' the Statute ſpeak of Ten't L. *&c.* and the Husband is not Ten't L. but only ſeiſed in the Right of the Wife. But if Husband and Wife loſe by Default and the Husband die, the Wife ſhall not have this Writ, for a *cui in Vita* is given her in that Caſe by *W.* 2. 3.

It has been queſtioned whether a *quod Deforceat* lies upon a Recovery by Default in an Action of Waſte againſt Ten't in Dower or by Curteſy, and it ſeems that it doth

doth; for tho' the Judgment be not given only on the Default, and the Defendant may give Evidence to the Jury which are to enquire on the Writ *de Vasto Facto* awarded on the Default, and the Jury may find no Waste done, as they may find against the Plaintiff when an Assise is awarded by Default, yet the Default is the principal Cause of the Judgment; and the Statute is beneficial, and therefore shall have a favourable Construction; and it is presum'd that the Defendant who loses by Default knows not of it; and the Wife shall be received on her Husband's making Default in such Action, and shall have a *cui in Vita* on a Recovery against her Husband by such Default, by Force of *W.* 2. 3. yet the Words of that Statute likewise are *per Defaltam*, *&c.* and a Writ of Deceit, which only lies on a Recovery by Default, lies on such a Recovery; and a *quod ei Deforceat* lies where an Assise is awarded by Default, *and the Jurors find for the Plaintiff*, in which Case it is evident that the Judgment is not given on the Default only. So if he in Rev'n be receiv'd on Default of Ten't L. and plead to Issue, and it be found against him, Ten't L. shall have the Writ, and yet the Verdict against him in Rev'n, as well as the Default of Ten't L. is the Cause of the Judgment.

As to the Objection, That this Writ lies only where no Attaint lies, the Answer is plain; 1. No (*a*) Attaint lies in this Case, because tho' the Verdict be found by the Oath of 12 Men, yet the Jurors are not liable to an Attaint, because it is but an Inquest of Office, *i. e. not found in a Court of Record*,

(*a*) 2 Cro. C. 414.

Record, on an Iſſue there join'd, but only found before the Sheriff, in order to inform the Court of ſome Particulars, without the Knowledge whereof they can't proceed. 2. An Attaint lies on Recovery by Default in Aſſiſe, and alſo a *quod ei Deforceat.*

As to the Objection, that this is a perſonal Action, it is true that at Law in Waſte againſt Ten't in Dower, *&c.* Damages only were recovered, yet ſince the Statute of *Gloceſter*, the Place waſted is to be recovered, and therefore the Damages are not now the Principal, for *omne magis dignum trahit ad ſe minus dignum*, and the Damages may be releas'd, and the Place waſted only recovered, which could not be, if the Damages were the Principal: And tho' in Waſte, in the *Tenuit* by Jointenants *againſt one who was their Ten't*, the Releaſe of one bars the other; yet in an Action of Waſte in the *Tenet*, whether againſt Leſſee L. or Y. the Releaſe of one bars not the other.

356. Every Writ of Waſte muſt ſuppoſe that the Waſte was done *ad Exhæredationem* of the Plaintiff, and the Inheritance muſt continue at the Time of the Writ. A Leſſee may plead *Riens in le Rev'n* generally againſt a Grantee of the Rev'n, but not againſt his Leſſor, but he muſt ſhew how it was devеſted.

Yet if Leſſee L. make a Feoffment on Condition, and the Feoffee do Waſte, and Leſſee re-enter, or if a Diſs'or of Leſſee L. do Waſte, and Leſſee re-enter, the Leſſor may have an Action of Waſte againſt the Leſſee, tho' the Rev'n was not in him when

he Waſte was done, *for when it is reveſted, e is reſtored to it in ſuch Plight as if it had lways continued in him, and it was the Leſ-ee's Fault to ſuffer the Waſte to be done*; ſo if Leſſee L. of Land belonging to a Biſhop o Waſte during the Vacancy, the Succeſſor ay have Waſte againſt the Leſſee. Vide 2 Inſt. 158.

N. B. Tho' the Diſcontinuance were by Matter of Record, the Remitter may be by Matter in *Pais*.

If the Husband make a Feoffment of the Wife's Land, and take back an Eſtate to himſelf and Wife and a 3d Perſon, the Wife is remitted but to a Moiety.

If the Husband make a Feoffment of the Wife's Land, and go beyond Sea, and ſhe take a State of Freehold in his Abſence, and he when he comes back agree to it, this is certainly a Remitter. And it ſeems alſo, that it is not in the Power of the Husband, when he comes back, by any Diſagreement to the Eſtate to prevent the Remitter; for it was a Remitter preſently, and the Huſband can't deveſt the State made to the Wife, which was deveſted by the Remitter before, and the rightful Eſtate being reſtored, it is not in his Power to revive the Wrong. Nor can the Wife, after his Death, avoid being remitted.

But if both Eſtates had been originally 357.
laveable, there tho *Primâ Facie* ſhe be mitted, yet after the Husband's Death, e may elect which of 'em ſhe will. As if and be given to Husband and Wife in e, and he make a Feoffment, and take

back a State in T. after his Death ſhe may chuſe either Eſtate.

Ten't in T. Female diſcontinues, and takes back a State in Fee, and dies, leaving a Daughter and *Privement Enſeint* with a Son, the Daughter is remitted, nor ſhall the Son born afterward devest it.

If the Husband make a Feoffment of the Wife's Land, and the Feoffee be diſſeiſed, and the Diſs'or let the Land to the Husband and Wife for L. this is a Remitter to the Wife, tho' the Diſs'or was a wrongful Doer, and the Entry of the Feoffee was lawful on him. But if the Wife were of Covin that the Diſs'in ſhould be done, ſhe ſhall not be remitted: For tho' ſhe can't be a Diſſeiſoreſs by her Command Precedent, or Agreement Subſequent, but by her actual Entry or proper Act only, yet it is holden that her Procurement or Agreement only to do a Wrong to cauſe a Remitter, ſhall make her Diſſeiſoreſs, ſo far as to make her loſe her End in agreeing to the Wrong, and ſhe ſhall not gain a Remitter by it.

Covin Covin is a ſecret Aſſent in the Hearts of two or more to the Defrauding and Prejudice of another, which often choaks a meer Right, and the ill Manner makes a good Matter unlawful. As if one who has juſt Cauſe of Action be of Covin to raiſe up a Ten't by Wrong againſt whom he may recover, ſuch a Recovery may be avoided, and tho' the Diſs'or's Endowment of one who has a good Title of Dower ſhall bind

he Diſs'ee yet if ſhe be of Covin to the Diſs'in, it ſhall not. If Ten't T. and his ſſue diſſeiſe the Diſcontinuee to the Uſe of Ten't T. and Ten't T die, the Iſſue ſhall ot be remitted as againſt the Diſcontinuee, ho' againſt all others he ſhall, and ſhall eraign the firſt Warranty. *A.* and *B.* are ointly intitled to a real Action againſt the Diſſeiſor's Heir, *A.* cauſes him to be diſeis'd by one againſt whom they both recoer, *B.* only ſhall be remitted.

If the Eſtate be made by the Diſcontinuee o the Husband and Wife on Condition, he Remitter, as it defeats the Eſtate, defeats he Condition, *&c.* annex'd to it, yet the Husband is eſtopp'd to plead it.

If the Husband had diſcontinued the 358.
Wife's Land, and taken back a State to himelf for L. Rem'r to his Wife for L. this had een no Remitter to her during the Huſand's Life, becauſe while he lived ſhe had o Freehold. But upon his Death the Freeold in Law caſt on her againſt her Will d been a Remitter, (and yet no Aſſiſe es for one that is ouſted of a Freehold in aw,) for there is none againſt whom ſhe ould bring her Action, and ſhe was Ten't o the *Præcipe*; nor did her Power to wave ch Eſtate prevent the Remitter, tho' ſhe as ſole and of Age at the Time when the reehold was caſt on her. So if Ten't T. ve Iſſue two Sons of Age, and he make Leaſe to the Elder for L. Rem'r to the ounger for L. or T. and die, the Elder is ot remitted becauſe he agrees to the Leaſe, t there ſhall be a remitter to the Young-

er, if the Elder die without Iſſue. So if the Heir of Diſſ'or make a Leaſe L. Rem'r to Diſſ'ee for L. *&c.* So if Ten't T. infeoff his Heir apparent and others by Deed, and make Livery to the others in the Heir's
359. Abſence, who never agrees, and the other die, and the Heir in his Father's Life never occupy nor take the Profits, and after the Father die, he is remitted. But it ſeems, that if the Son had ſealed a Counterpart either in this Caſe or in the former, where a Rem'r was limited to the younger Son, or if Ten't L. had been impleaded, and made
Vide ſupra 443. Default, and he in Rem'r had been receiv'd, he ſhould not be remitted, becauſe he agreed in the Father's Life. And tho' the Statute of *Gloceſter* give Damages againſt him that ſhall be found Ten't of the Land, yet if a Deed of Feoffment be made to *A. B.* and *C.* and Livery be given in *C.*'s Abſence, and *C.* never agree, nor take any of the Profits, and they die, and he ſurvive, and a Writ of Entry *ſur* Diſſ'in be brought againſt him, he may plead the whole Matter and diſcharge himſelf of the Damages, for a Statute ſhall never be ſo conſtrued that he who is purely innocent ſhall be damaged thereby.

360. And if an Abbot or Biſhop had diſcontinued, and Diſcontinuee had charged the Land, and afterward by Licenſe had infeoff'd the Abbot or Biſhop, the Succeſſor ſhould have been remitted, and ſhould have holden the Land diſcharged.

If one recover againſt Ten't T. in a falſe or feign'd Action by Default, *Nihil Dicit*, Confeſſion

Confeſſion or Demurrer, and ſue Execution, and after Ten't T. diſſeiſe the Recoverer, and die ſeis'd, his Iſſue ſhall be remitted. For if the Recoverer had continued ſeis'd, the Iſſue in a *Formedon* might have falſified the Recovery, and prov'd the Action feign'd in Law, and therefore he ſhall be remitted, becauſe there is none againſt whom he can bring his Action; and if Ten't T. againſt whom ſuch Recovery was had, had died before Execution ſued, and a *Scire facias* had been brought againſt the Heir, he might in pleading have ſhew'd how the Action was feign'd or falſe, and barr'd the Demandant. 361.

An Action is falſe when the Words of the Writ are falſe; as when they ſuppoſe Diſs'in where there was none: An Action ſaid to be feign'd, when tho' the Words of the Writ are true, yet by Reaſon of a Reaſe, or ſome ſuch Matter, the Demandant has no Right to recover.

If Land be recovered againſt Ten't T. the Iſſue cannot falſify in the Point tried *by the Jury*, tho' all the Jurors be dead, ſo that they can't have an Attaint; but he may falſify the Recovery by Pleading ſome Matter which Ten't T. did omit, or he may confeſs and avoid the Point tried.

If in a common Recovery Judgment be had againſt Ten't T. where he vouches, and the Judgment to recover over in Value, tho' he die before Execution, yet may it be ſued againſt the Iſſue in T. *for the Right of the Entail is bound by the Judg-*

ment to recover over in Value in Reſpect of the intended Recompence.

362. A Recovery had againſt Ten't L. whether with or without Title, and Execution had, diſcontinues the Rev'n or Rem'r; but if he be of Covin, and conſent to the Recovery, or ſuffer a common Recovery, he forfeits his Eſtate. And by 14 *El.* 8. full Remedy is provided for the Entry of him in Rev'n or Rem'r, tho' *the Action were not brought againſt Ten't L. himſelf, but againſt his Grantee, and* he came in as Vouchee; but if the Aſſent of him in Rev'n or Rem'r appear of Record, the Ten't L. is guilty of no Forfeiture; but ſuch Aſſent muſt appear on the ſame Record on Voucher, Aid Preyer, or Receipt of him in Rev'n or Rem'r, and not by any extrajudicial Entry, or Memorandum; nor does the ſaid Act extend to the Caſe where Ten't L. is impleaded, and vouches him that has the immediate Rem'r in T. who vouches over the Common Vouchee.

If Ten't T. diſcontinue and die, and the Iſſue bring a *Formedon* againſt the Diſcontinuee, who pleads Non tenure, and utterly diſclaims in the Tenancy, Judgment ſhall be that the Ten't go without Day, and the Demandant may enter notwithſtanding the Diſcontinuance. So if a Diſſ'ee bring a Writ of Entry *ſur Diſſ in* againſt the Diſſeiſor's Heir, who diſclaims, the Diſſ'ee may enter, and ſhall be remitted, or rather ſhall recontinue the former Eſtate, for in theſe Caſes the Demandant has no Right to two Eſtates; *what is here ſaid of Non-tenure pleaded*

pleaded, muſt not be underſtood of a ſimple Plea of Non-tenure, but of Non-tenure pleaded with a Diſclaimer, for the Plea of Non-tenure ſignifies no more than that the Ten't has not the Freehold which may be true, yet he may have a Rev'n in Fee expectant on a State L. ſo that in that Caſe, the Demandant re-entring ſhould not be remitted to the whole Fee.

In *Formedon* if the Ten't Diſclaim, the Demandant can't aver his Writ, but may pray his Judgment and enter, but where Damages are to be recovered, the Demandant may aver that he is Ten't, as the Writ ſuppoſes, for the Recovery of the Damages, or may relinquiſh the Averment, and enter into the Land becauſe of the Diſclaimer. 3 Lev. 330.

N. B. In the Caſe above, Judgment is *quod Tenens eat ſine die*, and the like Judgment is given when Excommunication is pleaded in Diſability of the Plaintiff, or when Judgment is given for the Ten't on any Plea in Bar, or to the Writ; and the Entry of the Judgment againſt the Plaintiff always is *quod Nihil Capiat per Breve*; whether the Plea went in Bar or to the Writ, and it appears by the Record on what Plea the Judgment was given. 363.

A general Averment is that which is uſed in the Concluſion of affirmative Pleas which is in this Form, *hoc paratus eſt Verificare*; a particular Averment is when the Life of Ten't L. or T. is avouched, which is call'd an Averment, tho' the Words *Verificare, &c.* be not uſed.

Where the Entry of a Man is lawful either in reſpect of a Diſs'in, *&c.* or of a Forfeiture, and he takes an Eſtate in Fee, Tail, or for L. or Y. yet he is remitted, tho' he be of full Age, and openly ſay in the Country that he claims nothing in the Land but by Force of ſuch Conveyance; but if he diſclaim in a Court of Record, that he has no Eſtate but by Force of ſuch Leaſe, *&c.* he is concluded; ſo if he take an Eſtate by Indenture, for that is the Deed of both Parties, and a Rent or Condition therein reſerv'd is good.

If a Diſs'or ſuffer a Stranger to uſurp to an Advowſon appendant, or the Diſcontinuee of a Manor grant away the Advowſon in Fee, yet the Diſs'ee or Iſſue by re-continuing the Manor, re-continue the Advowſon. A Patron is outlaw'd, the Church becomes void, ſix Months paſs, K. recovers in *Quare Impedit*, this re-continues the Advowſon to the Patron.

364. If two Jointenants, one of Age, the other within Age, be diſſeis'd, and the Diſs'or dies ſeis'd during the Nonage of one of 'em, and the Heir let the Land to them both being then of full Age for L. this is a Remitter to him whoſe Entry was lawful, not to the other.

Where Parceners or Jointenants have the ſame Remedy, and one enters, the other ſhall enter alſo; ſo where the Entry is not lawful, and they join in a real Action, and one is ſummoned and ſevered, and the other recovers, both ſhall enter; but when their Remedies are ſeveral, as when two Parceners are diſſeiſed and the Diſs'or dies ſeis'd, and

and then the Parceners die, and the Iſſue of one of 'em recovers, the Iſſue of the other ſhall not enter with her.

A. and *B.* Jointenants in Fee are diſſeis'd by the Father of *A.* who dies ſeiſed, *A.* being his Heir enters, he is remitted to the Whole, and his Companion ſhall take Advantage of it; tho' in the Caſe above, the Jointenant who was diſſeiſed in his Nonage ſhall only be remitted, for the Advantage which the Law gives him, is founded rather on his Infancy, *which is Perſonal and peculiar to him*, than on his Right; *but in this laſt Caſe the Right of Entry which* B. *had in Jointure with* A. *ſhall not be loſt by a Deſcent to* A. *in reſpect of the Privity between them.*

But if the Grandfather had been the Diſſeiſor, and the Land had deſcended from him to the Father, and from the Father to *A. B.* who ſhall enter with him, for the Entry was taken away by the firſt Deſcent.

And in the Caſe above, if the Infant Jointenant had ſurvived his Companion after the Deſcent to the Heir of the Diſs'or, ſome ſay he ſhould have entered into the Whole, becauſe he is now in Judgment of Law ſolely in by the firſt Feoffment, *and claims nothing from his Companion, whoſe Right of Entry was bound by the Deſcent.* Co. L. 185. a.

Of Warranty.

WArranty is a Covenant real, annex'd to Lands or Tenements, whereby one is bound to warrant the ſame, and either on 365.

365. Voucher, or by Judgment in *Warrantia Chartæ*, to yield others to the Value of thoſe evicted by a former Title. And if one bring an Action to recover Land which he is bound to warrant, the Ten't may plead the Warranty in Bar, which is called a Rebutter; and at Law all Warranties not commencing by Diſs'in, which deſcended to the Heirs of him that made 'em, barr'd the Heirs to demand Land againſt 'em.

There are likewiſe Contracts, *&c.* annex'd to Chattels, not here treated of; but what is here ſpoken, is to be underſtood of Warranty of Freehold, *&c.*

By the Statute of *Gloceſter*, *Ch.* 3. theſe Things are provided. 1. If Ten't by Curteſy, or Husband ſeis'd in Right of his Wife, alien with Warranty, and die, this ſhall be no Bar to the Heir in a *Mortance-ſtor* without Aſſets in Fee; but if Aſſets deſcend to him from the Father, he ſhall be barr'd, having Regard to the Value thereof. Tho' the Writ of *Mortanceſtor* only be mentioned in this Part of the Act, and after Writs of Aiel, *&c.* only, yet other the like Writs are within the Purview of the Statute, for the ſaid Actions are put but for Examples.

Tho' the Words be, if Ten't by Curteſy alien, yet if he releaſe with Warranty to the Diſs'or, it is within the Purview of the Statute: So if a Tenancy eſcheat to Ten't by Curteſy of a Seigniory, and he alien with Warranty and die, this ſhall not bind the Iſſue, for theſe Caſes are equally miſchievous.

But

But Ten't in Dower by Alienation with Warranty, might bar the Heir till 11 *H.* 7. 20. But an Eſtoppel on the Mother's Part barr'd not a Claim as Heir to the Father; as if Lands were given to *B.* and his Wife, and *B.*'s Heirs, and *B.* had diſcontinued in Tail to *C.* and after his Death the Wife had recovered in a *cui in vita*, ſuppoſing that ſhe had the Fee, and made a Feoffment, and died, and *C.* had died without Iſſue; the Iſſue of *B.* was not eſtopped to bring his *Formedon* in Reverter, for Warranties are favoured, but Eſtoppels are odious.

The Heir of a Diſſeiſor being a Feme, makes a Feoffment with Warranty, and marries the Diſſ'ee; the Wife's Warranty ſhall rebut the Husband tho' he claim not in her Right; *for it ſhall be preſum'd that he has Land in her Right to the Value of that which he demands, which might be recover'd from him and his Wife by Force of the Warranty, therefore he ſhall be rebutted to avoid Circuity of Action.* If Husband and Wife demand the Right of the Wife, a collateral Warranty of her Anceſtor is a good Bar.

B. ſeiſed in Fee levied a Fine to the Uſe of himſelf for L. and after to the Uſe of Wife in ſpecial Tail for her Jointure: They levy a Fine, and ſuffer a common Recovery, and die; this has been holden to be within the Meaning, tho' out of the Letter of 11 *H.* 7. *& e converſo*, a Caſe may be without the Meaning, and yet within the Letter; as if they both levy a Fine of the Land of the Wife, and Conuſee render to 366.

'em in ſpecial T. Husband dies, and Wife with a 2d Husband levies a Fine, this is out of the Meaning of the Statute, becauſe the Land came originally from the Wife.

But before 4 & 5 *Anne* 16. Collateral Warranty of every other Ten't L. barr'd the Heir in Rev'n or Rem'r, not entring in the Anceſtor's Life; but if he had enter'd for the Forfeiture, and avoided the Eſtate to which the Warranty was annexed, the Warranty was avoided alſo; *but by that Act all Warranties made by Ten't L. deſcending to him in Rev'n or Rem'r, are void.*

2. By Statute of *Gloceſter*, if Aſſets after deſcend, the Ten't ſhall, by Writ (which muſt be *Scire Facias*) out of the Rolls of the Juſtices, recover the Inheritance of the Mother: But in *Formedon*, if the Demandant recover for Want of Aſſets at the Time of the Warranty pleaded, and after Aſſets deſcend, the Ten't ſhall recover the Aſſets and not the Land entail'd; for if he ſhould recover the later, and after the Aſſets ſhould be aliened, his Iſſue might recover the Land entailed again; therefore to prevent future Occaſions of Suits, the Judges reſolv'd the ſaid Diverſity in the ſaid Caſes.

If the Ten't will be aided by the Statute he muſt plead the Warranty, and confeſs the Demandant's Title, and pray that the Benefit of the Statute may be ſaved to him; but if he plead the Aſſets deſcended, and Iſſue be taken thereon, and found againſt him, he loſes all Advantage of the Statute by his falſe Plea.

Warran

Warranty may be annex'd to Incorporeal Inheritances, and to a Rent newly created; and if the Land be evicted by an elder Title, the Grantee may be help'd by *Warrantia cartæ*; and a Warranty in Law is imply'd in a Grant of a new Rent in Exchange or for Owelty of Partition.

B. seis'd of a Rent-Seck in Fee, takes a Wife, and releases to the Ten't, and Warrants *tenementa prædicta*, and dies, the Wife brings Dower for the Rent; the Ten't shall vouch the Heir of the Husband, for tho' the Release enur'd by Way of Extinguishment, yet the Warranty extended to it, and by Warranting of the Land, *the Warrantor is bound to secure it to the Warrantee in the same Freedom in which it was at the Time of the Warranty made*; and therefore all Rents, *&c.* issuing out of it, that were suspended or discharged, are warranted also.

Warranty commencing by Diss'in is so call'd, because regularly the Conveyance to which it is annex'd works a Diss'in; as when Lessee Y. or Ten't by Execution, or Guardian, make a Feoffment with Warranty, *&c.*

So where a Diss'in, Abatement, or Intrusion, or Entry into Land escheated to the Lord before the Lord's Entry, *&c.* is made, with an Intent to make a Feoffment with Warranty.

Such Warranties shall never bar the Heir whether the Wrong were done immediately to the Heir or not; therefore if the Father be Ten't L. with Rem'r in Fee to the Son, and the Father by Covin make a Lease Y. to the Intent that the Lessee may make a Feoffment

Feoffment to one to whom the Father ſhall make a Releaſe with Warranty, and this be executed accordingly, it ſhall not bind the Son, for the Father was *particeps criminis*. *B.* gives Land in *T.* to a Brother, the Uncle diſſeiſes the Donee, makes a Feoffment with Warranty, and the Donee dies without Iſſue, *B.* is not barr'd. Father and Son and *B.* are Jointenants in Fee, the Father makes a Feoffment of the whole with Warranty and dies, the Son dies, *B.* ſhall avoid the Feoffment for the Son's Part as well as his own.

367.

Tho' a Feoffment by Leſſee Y. work a Diſſeiſin to the Leſſor, yet it is a good Feoffment between the Parties, and againſt all Strangers except him that has Right; and the Feoffor and his Heirs may be vouch'd by Force of it, and ſuch Feoffment, by the Lord being Leſſee Y. of the Tenancy, ſhall extinguiſh the Seigniory.

Y

Father and Son are Jointen'ts in Fee, the Father aliens the whole with Warranty, and dies, the Son ſhall avoid it for a Moiety: But if they had been Jointen'ts L. Rem'r to the Son in Fee, and the Son had enter'd in the Father's L. *for the Forfeiture*, he had avoided it wholly: But if he had not enter'd in the Father's Life, he ſhould have avoided it for a Moiety only, before 4 & 5 *Anna* 16. becauſe the Warranty commenc'd not by Diſs'in but for a Moiety. If they had been Jointen'ts L. Rem'r to the Father in Fee, the Son's Entry, *tho' it ſhall re-continue his own Eſtate L. in the Moiety where-*

of

of he was diſſeis'd, ſhall not avoid the Warranty of the Fee of the ſaid Moiety, becauſe it was in the Father's Power lawfully to convey the ſame.

An Infant, and *B.* being of Age, join in a Feoffment *with Warranty of Lands whereof they are jointly ſeiſed*, the Warranty is good as to *B.* for the whole, *for one may warrant more than paſſes from him*, and void as to the Infant; for tho' his Feoffment be but voidable, his Warranty, taking Effect by Deed only, is void.

B. is ſeis'd of an Houſe, and *C.* having no Title enters, claiming it to him and his Heirs; *B.* ſtill abiding in it, the Law adjudges *B.* in Poſſeſſion, for *duo non poſſunt in ſolido unam rem poſſidere:* And when two are in Tenements claiming by ſeveral Titles, he is in Poſſeſſion that has Right to have the Poſſeſſion: But if *C.* make a Feoffment with Warranty to certain Barretors, to have Maintenance from 'em, by reaſon of which *B.* leaves the Houſe, (which muſt be before the Livery of Seiſin, or otherwiſe the Livery is void,) this is a Warranty commencing by Diſſeiſin. 368.

A Barretor is a Mover of Suits and Quarrels, in Courts of Record or Courts-Baron; or in the Country, three Ways. 1. By Diſturbance of the Peace. 2. Taking or keeping Poſſeſſion of Lands in Controverſy, by Force or Subtilty. 3. Spreading falſe Rumours and Reports to raiſe Diſcord among Neighbours.

Extortion, in a large Senſe, is any Oppreſſion under Colour of Right. Properly

in

it ſignifies any Officer's unlawful taking by Colour of his Office any Fee not due, or more than is due, or before it is due. By *W.* 1. no Miniſter of K. ſhould take any Reward for doing of his Office, but only that which the K. allows him, on Pain to render double to the Party, and to be puniſhed at K.'s Pleaſure, and this was an Offence fineable at Law. But later Statutes have allowed 'em Fees in many Caſes. It is no Extortion for inferior Officers of Courts to have ſuch reaſonable Fees as have been allow'd by the Courts for their Attendance.

Maintenance is an Upholding of Quarrels and Sides, to the Hindrance of Common Right, and is twofold: 1. In the Country, as by taking and holding Poſſeſſions, &c. which is puniſhable only at K.'s Suit. 2. In Court, and this either, 1ſt, By maintaining to have Part of the Thing in Plea, which is call'd *Champerty*; *and againſt ſuch Offender a Writ of Champerty lies grounded on* Articuli ſuper Chartas, *and the Offender ſhall forfeit to K. the Value of what was purchas'd by him, and it ſeems that the Seller ſhall forfeit the ſame.* Or, 2dly, By maintaining one Side without having any Part of the Thing in Suit, *and for this an Action of Maintenance lies at Common Law.* Or, 3dly, By labouring a Jury, tho' it be but to appear, or inſtructing them, or putting 'em in Fear; and this is call'd Embracery, and an Action of Maintenance lies againſt the Offender. If one give Money to any of the Jurors, a *decies tantum* lies againſt him, and ſuch Jurors, *at the Suit of K.*

F. N. B. 172.

369.

2 Inſt. 208.

5 E. 3. 10.
34 E. 3 8
38 E. 3. 12.

K. *or of the Party, or any Stranger.* Nor is it material whether the Jury paſs on his Side, or give any Verdict at all.

By 32 *H.* 8. 9. he that buys, ſells, takes, or makes Promiſe, Grant, or Covenant, to have any Right or Title to any Land, Tenement, or Hereditament, whereof the Seller, or they from whom he claims, have not been in Poſſeſſion a Year before, ſhall forfeit the whole Value of the Lands.

Any naked Right ſtripp'd of Poſſeſſion is within the Statute, whether it be really a good Right, as that of a Diſs'ee, or pretended only by a Stranger. So if it be a good Right coupled with a wrongful Poſſeſſion; as if a Diſs'ee diſſeiſe Diſs'or's Heir, and make a Feoffment before he has been a Year in Poſſeſſion.

A cuſtomary Right to a Copyhold is within the Statute, and ſo is a Leaſe Y. for the Words are any Right; but a Leaſe Y. made to try the Title in Ejectment, is not within the Statute, unleſs it be made to a great Man, or any other to ſway the Cauſe.

But whoever has the abſolute Ownerſhip, ſo as no other has *jus Proprietatis*, or *Poſſeſſionis*, may ſell, tho' he has not been a Year in Poſſeſſion. As if one be remitted, or recover on a former Title, or redeem a Mortgage, or being a Diſs'or gain the Releaſe of the Diſs'ee.

There is a *Proviſo*, which the Law wou'd have imply'd, That he who is in lawful Poſſeſſion may take a Releaſe of a pretended Right by any reaſonable Means; and tho' Man's Poſſeſſion be wrongful as by Diſſeiſin,

ſin, *&c.* yet a Releaſe to him is lawful. A Rem'r Man may lawfully get a Releaſe or Confirmation of any Stranger, having a pretended Right: But it is unlawful to take a Covenant, that when he has recovered he ſhall convey to him, for this is not a reaſonable Means.

If a Man enter into Land to which he has no Title, and preſently make a Feoffment with Warranty, or if he diſſeiſe one with Intent to make a Feoffment with Warranty, and afterward make ſuch Feoffment, theſe Warranties commence by Diſs'in; for in the 1ſt Caſe, *quæ in continenti fiunt ineſſe videntur*; in the 2d, the Law couples the Intent, and Feoffment made in Purſuance thereof together.

370. One ſuing a *Juris utrum*, or other Writ in the Right of the Church, ſhall not be barr'd by a Warranty of his Anceſtor. And it ſeems alſo, that he ſhall not be barr'd in Aſſize, tho' it be brought of his own Seiſin, and the mean Profits be to be recovered to his own Uſe, for the Freehold is the Right of the Church.

K. before *W.* 2. might be barr'd of a Poſſibility of Reverter deſcending to him *in jure Coronæ*, by Warranty and Aſſets from a Subject deſcending on his Body natural; *for in all likelihood thoſe Lands will deſcend to the ſame to whom the Crown will deſcend, and conſequently will be a good Recompence for the Loſs of the Crown-Lands; but in the Caſe of the Parſon, his Succeſſor can have no Benefit of what the Predeceſſor has in his natural Capacity.*

A War-

A Warranty is ſaid to be lineal, whether it deſcend on an Heir lineal or collateral, if he on whom it deſcends might poſſibly have claimed the Land as Heir to him that made the Warranty. As when the Father ſeis'd in Fee makes a Feoffment with Warranty, and dies, and the Warranty deſcends to the Son: Or when the Father releaſes with Warranty to the Grandfather's Diſſ'or, and dies, and the Warranty deſcends to the Son, for he can't convey to himſelf the Deſcent of the Land but by the Father. So if the elder Son releaſe to the Father's Diſſ'or with Warranty, and die without Iſſue, and then the Father die, the Warranty is lineal, becauſe the younger might have convey'd the Title to the Land from the elder. And note, that in theſe two laſt Caſes the Warranty deſcends before the Right. Co. L. 388.

But if the Father diſſeiſe the Son, and make a Feoffment with Warranty, this is collateral, for the Title which the Son has can't poſſibly deſcend from the Father; ſo if the youngeſt Son releaſe to the Father's Diſſeiſor with Warranty, and it deſcend on the eldeſt, for they that make theſe Warranties are collateral to the Title of the Land. 371.

Warranty may be annexed to any Conveyance whereby an Eſtate paſſes, or to a Releaſe or Confirmation made to the Ten't of the Land by one who never had any Eſtate therein, but a Voucher by Force of ſuch Warranty may be counterpleaded; and *quere*, whether an Aſſignee can take Benefit thereof.

If

372. If Ten't T. have Iſſue three Sons, and diſcontinue, and the middle Brother releaſe with Warranty. and die without Iſſue, this is collateral to the eldeſt. and ſhould have barr'd him, (*before* 4 & 5 Annæ 16. *but by that Statute all collateral Warranties of Lands, &c. by any Anceſtor who has no Inheritance in the ſame, are void againſt the Heir*;) but it is lineal to the youngeſt, and ſhall not bar him by Force of *W.* 2. 1. for he might poſſibly have convey'd to himſelf a Deſcent by Force of the Tail from the middle Brother, but the eldeſt could not. Hence note, That a Warranty which is lineal as to one may be collateral to another.

A collateral Warranty did never give a Right, but only bound it, and therefore if it be determined or defeated, the Right revives. The Plaintiff may make himſelf a Title in an Aſſiſe by it, where the Right of the Ten't is bound by it.

By 32 *H.* 8. 36. a Fine with Proclamations, levy'd by Ten't T. bars the Eſtate T. but not the Rev'n or Rem'r, if Claim be made within five Years after the State T. ſpent. A Gift in T. is made to the eldeſt Son, Rem'r to the Father in T. the Father dies, the Son levies a Fine with Proclamations, the firſt Eſtate T. and Rem'r alſo are barr'd, for the Rem'r deſcended to the Son.

A Fine with Proclamations by the Ten't of the Land, bars the Right of an Entail, if he that has Right to the Entail claims
4 H. 7. 24. not within five Years.

If

If Ten't T. in Poſſeſſion, or he that has Right of Entry be attainted of High Treaſon, the Land is forfeited to K. and the Entail barr'd. 26 H. 8. 13. 33 H. 8. 20.

A common Recovery bars all Entails, but ince 34 *H.* 8. 20. it is not in the Power of Ten't T. of the Gift of the Crown, by any Act or Thing had, done, or ſuffered by him, o bar an Eſtate T. whereof the Rev'n or Rem'r ſhall be in the Crown.

But if K. have granted away the Rev'n n Fee, or if the Eſtate T. were made origi-ally by a Subject, or by K. before he was K. it may be barr'd.

A Common Recovery never could bar a Rev'n in K. and ſince the Statute, if K. nake a Gift in T. Rem'r in T. as the Eſtate n Poſſeſſion cannot be barr'd, ſo neither can he Rem'r.

Thoſe Words in the Statute, where the Rem'r ſhall be in K. are not void; for if he K. for good Conſideration procure a Gift in T. to be made to a Subject, Rem'r o himſelf, this Rem'r is within the Act, if be in Fee or T. not for L. or Y. only.

Tho' ſuch Ten't T. can't bar the Entail 373. y any Act done or ſuffered by him, yet it ay be barr'd by Acts to which he is not rivy; as if a Diſſeiſor levy a Fine with roclamations, and five Years paſs, or if a ollateral Anceſtor had releaſed with War-anty *before* 4 *&* 5 *Ann.* 16.

The Act extends to Gifts in T. made nce the Statute, for they are in equal Miſ-hief, tho' it only mention Gifts in T. made efore.

A Re-

A Recovery in a *Ceſſavit*, or Writ of Right without voucher, are not Bars of any Eſtate-tail.

If Ten't T. be diſſeiſed, have Iſſue and die, and his Uncle releaſe with Warranty, and die without Iſſue, the Warranty is collateral to the Iſſue in T. becauſe he can't convey himſelf to the Entail by means of his Uncle; and ſuch Warranty did bar the Iſſue to demand the Land *before* 4 & 5 *Annæ* 16.

The Reaſon why a Warranty was a Bar at Common Law, was for that *Nemo præſumitur alienam poſteritatem ſuæ prætuliſſe.* And no Proof is admitted againſt this Preſumption; (*and tho' lineal Warranty after* W. 2. *was holden to be no Bar without Aſſets, yet it was holden that collateral Warranty remained after the ſaid Statute as it was at Common Law:*) So if the Lord make an Acquittance for the laſt Rent, all the reſt is preſumed to be paid, and the Law will admit no Proof againſt the Preſumption; *for it can't be imagined that the Leſſor who is not bound to give any Acquittance ſhould voluntarily by his ſolemn Deed acquit the Ten't of Rent due on a later Day, if he were in Arrears before: But where a Ten. is in Arrears, and Leſſor diſtrains, and avows for Rent due the laſt Day of Payment, this ſhall not eſtop him to demand Rent due a former Day; for perhaps he might not punctually be certain how much was due, and therefore willing to demand no more at firſt than he was ſecure of recovering, and bring a new Action afterwards for the reſt.* If Ma

1 Sid. 44. 1 Lev. 43. Vid. 1 Sau. 285, 286 2 Lut. 1173.

Man be within the Four Seas, and his Wife have a Child, the Law presumes it to be his. If a Man be found to have fled for Fear of Felony, he forfeits all his Debts and Chattels, tho' he be after judicially acquitted of the Felony, and no Proof can be against the Presumption grounded on his Flight; *nor does he deserve any Favour from the Law who will not suffer himself to be tried by it*; but the general Rule is, *Stabitur præsumptioni donec probetur in contrarium.*

Ten't T. has Issue two Daughters, and dies, the eldest enter into the whole, and thereof make a Feoffment with Warranty, and dies without Issue; this is collateral to the youngest as to the one Moiety which belong'd to her, and lineal as to the Moiety belonging to the eldest.

A Parcener by entring into the whole, devests not the Moiety of the other; but if he claim the whole, and take the whole Profits, this does devest the other's Moiety; but she cannot, after an actual Entry by her Companion, devest her Moiety without an actual Ouster: And it may be ask'd, How the Warranty in the Case above could bind, being it was annex'd to a Feoffment, which did work a Wrong? The Answer is, when the Sister enters into the whole, and makes a Feoffment of the whole, the subsequent Act so far explains the first Entry, that now by Construction of Law she was at first seis'd of all. Vide supra 331. 374.

Ten't in Special T. has Issue a Daughter, his Wife dies, he marries again, and has Issue another

another Daughter, and diſcontinues; a collateral Anceſtor releaſes with Warranty, which deſcends on both Daughters, the elder was wholly barr'd for the Warranty is entire.

By Force of *W.* 2. lineal Warranty without Aſſets is no Bar of an Eſtate T. but it is ſtill a Bar to an Eſtate in Fee, and collateral Warranty was a Bar both of a State in Fee and T. with or without Aſſets, *before* 4 & 5 *Annæ* 16.

Aſſets requiſite to make a lineal Warranty a Bar, muſt be of equal Value with the Land which it bars one to demand, and deſcend from the ſame Anceſtor that made the Warranty; and it muſt be a real Inheritance in State or Intereſt, not a bare Uſe, or a Right of Entry or Action, which are not Aſſets till they are reduc'd to Poſſeſſion: But a Rent iſſuing out of the Heir's Land deſcending to him, whereby it is extinct, is Aſſets. An Advowſon is Aſſets, and may be extended at the Rate of a Shilling for every Mark of the yearly Value of the Living. A Seigniory in *Frankalmoine* is not Aſſets, becauſe it is not valuable.

375. Land is giv'n to Husband and Wife in ſpecial T. he makes a Feoffment, and dies, ſhe releaſes with Warranty, and dies, this is lineal as to the whole; and the Law is the ſame if the Gift had been before Marriage, in which Caſe they had taken by Moieties, for the Heir muſt claim as Heir of both their Bodies.

A. B. and *C.* are Brothers, a Gift is made to *A.* in L. Rem'r to *B.* in T. Rem'r to *C.* in

T. *A.* diſcontinues with Warranty, this is collateral to the Brothers, becauſe the Rem'rs are their Titles, and to thoſe *A.* is collateral; *and it ſeems that ſuch a Warranty does ſtill bar the Rem'rs, becauſe it is not within* 4 & 5 Annæ 16. *which ſpeaks only of Warranties made by them who have no Eſtate of Inheritance in the Land,* &c. Sed Q. *If a Warranty made by the Donor ſhall be a Bar, inaſmuch as tho it be collateral, and made by an Anceſtor who has an Inheritance in the Land, yet the Eſtate of the Donees doth not depend on the Donor's, but his on theirs.*

Warranty always deſcends to the Heir at Law of him that made it; therefore if an elder Brother be Ten't in Tail Male, Rem'r to the younger, and make a Feoffment with Warranty, and die, leaving a Daughter, the younger is not barr'd, becauſe the Warranty does not deſcend on him. 376.

If the Warranty deſcend on one, and the Land on another, as ſpecial Heir, *viz.* by Cuſtom of *Burgh Eng.* or *Gavelkind*, or Heir on the Part of the Mother; the Heir at Law may either be vouch'd alone, or the other may be vouch'd with him as Heir to the Land; and it ſeems that if there be a Warranty Paramount, they ſhall join in deraigning it, and the Recompence ſhall go to the ſpecial Heir alone, for he only had the Loſs. So if a Recovery be had againſt Ten't T. and his Wife, and they vouch, and have Judgment to recover in Value, he dies, his Iſſue only ſhall ſue Execution, tho' the Wife was privy to the Judgment.

Baſtard *eigne* ſhall be vouch'd alone, ſo he is Heir in Appearance by taking th Profits, and ſhall not diſable himſelf.

But a Perſonal Lien deſcends on all th Heirs; as if an Obligor die ſeiſed of Gave kind Land, Debt lies againſt all his Sons.

And Debt on the Anceſtor's Bond may b maintained againſt the Heir of the Mother Part only.

377. If Land be given to *A.* and the Hei Males of his Body, Rem'r to the Heirs Fe male of his Body, (in which Caſe all th Iſſue Male ſhall firſt take, and the Eſtate t the Females is in Rem'r;) Donee make Feoffment with Warranty: This is lineal t his Daughters as well as Sons; for where ever the Anceſtor takes a State L. and afte in the ſame Conveyance there is a Limita tion to any of his Heirs, the Inheritanc veſts in the Anceſtor. But in this Caſ Warranty made by a Brother, is collater to the Siſters.

If Land be given to the eldeſt Son in T on Condition, that if he or his Iſſue ſhal alien in Fee or T. *&c.* that then their Eſta ſhall ceaſe and be void, and that the Lan ſhall immediately remain to the 2d Son i T. *& ſic ultra*, the Rem'r to the other Sons and Livery be made accordingly, the Rem'rs are void.

378. 1. Becauſe every Rem'r commencing b Deed ought to veſt in him to whom it is li mited, when Livery is made to him that ha the particular Eſtate. But when Land i rendred by Fine for L. Rem'r in Fee or T the Rem'rs are not in 'em in Rem'r, before th

he particular Eſtate is executed. And when Rem'r on a Leaſe L. is limited to the Heirs f *J. S.* then living, it is not poſſible that ſhould veſt while *J. S.* lives; but it is ufficient that the Inheritance paſſes preently out of the Leſſor. So if a Leaſe L. be nade to *A. B.* and *C.* and if *B.* ſurvive *C.* hen the Rem'r to *B.* in Fee; this is a good Rem'r, for it depends on a Limitation of ime, *viz.* the Poſſibility of the Death of ne Man before another, which is a comnon Poſſibility.

One makes a Leaſe L. with Condition to ave Fee, and warrants the Land *in formâ redictâ, &c.* The Condition is perform'd in he Leſſor's life, or after his Death, the Warnty encreaſes with the Eſtate, for there was preſent Eſtate on which it might enure; nd the whole veſts in the Leſſee in ſuch nner as if it had paſs'd by the Livery. ut if a Seigniory be granted for Y. on ondition to have Fee, with Warranty *in rmâ prædictâ*, the Warranty ſhall not exnd to the Fee, becauſe the firſt Eſtate was ot capable of a Warranty: So if one make Leaſe Y. Rem'r in Fee with Warranty *in rmâ prædictâ*, Rem'r Man can take no Beefit of the Warranty, becauſe he is not arty to the Deed; and if he were, he could ot take immediately, becauſe named after he *Habendum*; and *he can't take Benefit of it by Way of Rem'r, becauſe* the Leaſe Y. is not apable of a Warranty. If Land be given to . and *B.* Rem'r to the Heirs of him that hall die firſt, with Warranty *in formâ redictâ*; *A.* dies, his Heir ſhall have the

Warranty, and ſhall have the Land as Heir, *tho' the Fee veſted not in* A. *and he had but a Poſſibility.*

Co. L. 26. a. 46. b. 2. The Rem'r in the Caſe aforeſaid is void, becauſe the ſame Alienation that transfers the Fee and Freehold to the Alienee, and deveſts the Donor's Rev'n, can't veſt a Rem'r in the 2d Son: As if a Leaſe be made with Condition, that if Leſſor grant over the Rev'n the Leſſee ſhall have Fee, and the Leſſor grant the Rev'n by Fine, the Leſſee can't have Fee, for the ſame Alienation can't veſt an Eſtate of the ſame Land in ſeveral Perſons at once. *J. S.* grants the next Preſentation of a Church, and before it becomes void, grants the next Preſentation of the ſame Church to another, the 2d Grant is void: But if the Patron take a Wife, and grant the 3d Preſentation, and die, and the Heir preſent twice, and the Wife the 2d Time, the Grantee ſhall have the 4th Preſentation, for the 3d was given to the Wife by Act of Law, and the 3d Preſentation in the Grant ſhall be taken for the 3d which he lawfully might grant. *Sed Q.* (a) *How one can take any other Turn by a Grant of the 2d or 3d Turn, which can by no Means be brought within thoſe Words.*

379.

(a) Cro. Ja. 691.

3. In the ſaid Caſe theſe Words, on Condition, *&c.* that the Eſtate ſhall ceaſe, give a Re-entry to the Donor only, and the Words ſubſequent are void. Father makes Gift in T. to his eldeſt Son, Rem'r to the Youngeſt, with ſuch Condition as is in the Caſe in Queſtion, the Eldeſt makes a Feoffment with Warranty, Father dies, and the

e Eldeſt dies without Iſſue, the Youngeſt ill enter; *for the Condition, by Force where- the Father might have enter'd, deſcending to e Eldeſt was but ſuſpended; nor can the el- ſt Son's Feoffment with Warranty in the Fa- er's Life bar the youngeſt Son of his Entry Force of the Condition, which depending on e original Deed binds the State of the Land o whoſe Hands ſoever it comes, and can't be veſted or barred by a Warranty*; yet if the deſt Son diſſeiſe the Father, and make a coffment with Warranty, and die, he bars e Youngeſt, *becauſe the Father's Eſtate in e Land being deveſted and turn'd to a Right, s conſequently capable of being barr'd by a Warranty:* And where the eldeſt Son is ound not to diſcontinue on ſuch Condi- on as is aforeſaid, if he make a Diſconti- uance after his Father's Death, the Condi- on is extinguiſh'd, *for it was in him as Heir his Father at the Time of the Feoffment, d was as much releas'd by it as if he had ex- reſly releas'd it by Deed.*

At Law, if Ten't in Dower had alien'd 380.
ith Warranty during the Nonage of the eir, and died, this had not barr'd his En- y; but if he had come to full Age before r Death, he had been barr'd, for it was his olly not to enter and defeat the Warranty; nd tho' in the firſt Caſe his Entry were not arr'd, yet if he had brought an Action he ould have been barr'd in it; and if his ntry were taken away when the Warran- deſcended, his Right was bound by it. nd the Law was the ſame as to a Feme

Covert. But Laches ſhall not be imputed to an Infant to take away his Entry in reſpect of a former Right by a Deſcent, or to bar his Right where his Entry is congeable. But he ſhall be ſubject to all Conditions, Charges and Penalties growing out of the original Conveyance, and a *Ceſſavit* lies againſt him for Land of his own Purchaſe, and likewiſe for Land by Deſcent; but in the later Caſe he ſhall have his Age. Matters of Record, as a Fine levied by an Infant, or a Recovery ſuffered by him, or a Statute acknowledged by him during his Nonage *appearing in proper Perſon*, ſhall never be revers'd after his full Age, but only by Writ of Error, or *Audita Querela* brought during his Nonage, which *in that Caſe* can be tried by Inſpection only, *for the Law will not give Credit to any Averment ſo derogatory from the Honour of thoſe who are preſumed to act with the greateſt Integrity; and will admit of no Evidence leſs than that of Senſe in a Matter of ſo high a Nature; but if an Infant appear by Attorney, and a Recovery be had againſt him, he may avoid it by Writ of Error for this Cauſe after his full Age, for* (a) *whether he were within Age when he made the Warrant of Attorney ſhall be tried by the Country, and the Reverſing ſuch Recovery no Way reflects on the Honour of the Court; but if an Infant appear by his* (b) *Guardian, and the Court knowing him to be an Infant, after Examination had of the Circumſtances, admit him to levy a Fine, &c. this ſhall never be reverſed either during his Nonage or after.*

(a) Cro. E. 569.

(b) 1 Syd. 322. Hob. 224.

If

If Land had been given to the Husband and Wife in Fee, before 32 *H.* 8. 28. and the Husband had made a Feoffment, and a collateral Anceſtor of the Wife had releas'd and died, and then the Husband had died, this ſo bound the Wife's waveable Right, that ſhe could not wave it and claim Dower.

In the End of the Statute of *Gloceſter* 3. 381.
it is thus provided, the Heir after the Death of the Father and Mother ſhall not be barr'd to demand the Heritage or Marriage of his Mother, which his Father alien'd in his Mother's Time, whereof no Fine is levied in the K.'s Court. And this Exception has been conſtrued to extend only to a lawful Fine, *i. e.* one levied both by Husband and Wife, and not to one levied by Husband only, for theſe Reaſons.

1. It is moſt natural to expound one Part 382.
of a Statute by another, and by this Act the Alienation of Ten't by Curteſy by Fine with Warranty is reſtrain'd; therefore it ſhall be intended that the Alienation of the Husband alone ſeis'd in Right of his Wife was deſign'd to be reſtrain'd alſo.

2. The general Words of a Statute ſhall be intended of a lawful Act, but a Fine by Husband alone works a Wrong to the Wife.

3. A Fine by the Husband alone is within the Miſchief deſign'd to be remedied by the Statute, which was that the Heir ſhould be barred of the Inheritance of his Mother by the Father's Warranty without Aſſets.

383. An expreſs Warranty of a Freehold or Inheritance can be created only by the Word *Warrantizo* in *Latin*, or Warrant in *Engliſh*, for *Warrantizabimus* is the only Word in a Fine which is ever uſed to this Purpoſe.

Tho' it be not expreſs'd to whom the Warranty ſhall extend, yet the Law by Implication gives the Benefit of it to the Feoffee.

384. A Bond with Condition to defend ſuch Land to *A.* for 8 Years is forfeited if a Stranger ouſt him without Action; but if it were on Condition to warrant the Land, it ſhall not be forfeited unleſs the Obligee be impleaded, and then the Obligor muſt be ready to warrant, *&c.*

The Words Grant, Demiſe, and the like in the Conveyance of a Chattel real create a Warranty in Law, *by force (a) whereof the Grantee, if evicted, ſhall in Action of Covenant recover Damages to the Value of what he has loſt.*

(a) 4 Rep. 80.

At Law, if one had given Lands in Fee by the Word *Dedi*, to hold of himſelf and his Heirs, the Feoffor and his Heirs were bound to Warranty; but if he had given them to hold of the chief Lord, he was bound to Warranty during his own Life only, as a Feoffor by the Word *Dedi* is at this Day. If the Feoffee recover in Value by Force of ſuch an implied Warranty, or of an expreſs Warranty made for the Life of the Feoffor only, he ſhall have a Fee in the Land recovered, *becauſe the Warranty, while it continues, extends to the whole Eſtate of the*

e Land. If one make a Leaſe L. or Gift
, rendring Rent, not only the Donor and
effor and their Heirs, but alſo their Aſ-
gnees of the Rev'n are bound to warrant
he Land to the Leſſee and his Aſſignes:
nd if the Leſſor alſo add an expreſs War-
nty, yet the Warranty in Law remains,
nd the Leſſee has Election to uſe either;
n like Manner, if a Feoffor by the Word
edi add a ſpecial Warranty againſt *J. S.*
nd his Heirs, yet *Dedi* gives a general
Warranty, againſt all Men, during the
ife of the Feoffor. *For the expreſs Warran-*
ſhall not take away that implied by Law,
here they may both well ſtand together, and it
manifeſt that the expreſs Warranty is added
give the greater Security to the Feoffee or
eſſee. (a) But where one makes a Leaſe Y. (a) 4 Rep.
the Words Grant, Demiſe, &c. *and cove-* 80.
ants that the Leſſee ſhall enjoy the Land with-
t any Eviction from the Leſſor or any claim-
g under him; in this Caſe the Leſſor ſhall not
bound to warrant the Land, by the imply'd
Warranty, againſt an Eviction by a Stranger,
r thoſe Words can be of no Force, unleſs they
taken to explain how far the Leſſor ſhall be
ound to warrant; and where it expreſly ap-
ears how far the Parties deſign that the War-
anty ſhall extend, the Law will not carry it
rther by Conſtruction of thoſe Words, which are
enerally uſed as Words of Courſe.

Endowment implies a Warranty, *viz.* that
he Ten't being impleaded ſhall recover in
Value on Voucher the 3d of the two Parts
whereof ſhe is Dowable. And Homage

Anceſtrel, Exchange, and Partition imply a Warranty, but the Aſſignee ſhall not vouch by Force of theſe Warranties; but in caſe of an Exchange, *Partition* and Feoffment by *Dedi*, he ſhall rebut, *but the Aſſignee of Ten't by Homage Anceſtrel, ſhall neither vouch nor rebut the Lord, for the Advantage given to the Ten't in reſpect of the long Continuance of the Tenure can't be transferred to any Stranger.*

Warranty in Law and Aſſets in ſome Caſes are a good Bar in *Formedon*; as the Ten't may plead that the Anceſtor exchang'd the Land demanded with the Ten't for other Land which deſcended to the Demandant, whereunto he hath entered and agreed; or if he hath not entered and agreed, then he may plead the Warranty, and other Aſſets deſcended. But if Ten't T. make a Gift in T. or a Leaſe L. rendring Rent, and die, the Rev'n and Rent ſhall not bar the Iſſue in a *Formedon*, becauſe the Deſign of the *Formedon* is to defeat the Rev'n and Rent; and *non poteſt adduci exceptio ejuſdem rei, cujus petitur Diſſolutio*, but the Warranty in Law with other Aſſets is a good Bar.

Warranty in Law binds the Heirs of him that made it, but Warranty in Deed does not unleſs they be named.

An expreſs Warranty can't be created by Will, becauſe a Man can't bind his Heirs to warrant, any more than he can bind his Heirs to pay Money, unleſs he be bound himſelf; but a Warranty in Law may be by Will, as when one deviſes Land for L. or in T. rendring Rent.

Co. L. 386. a.

War-

Warranty in Law in ſome Caſes extends only to Execution in Value of ſpecial Land; as in caſe of Exchange and Partition, and it may be created without Deed, but expreſs Warranty cannot.

An expreſs Warranty extends neither to the Heirs nor Aſſigns of the Feoffee, unleſs they be named; but if *B.* be infeoff'd with Warranty to him, his Heirs and Aſſigns, and infeoff *C.* and his Heirs, and *C.* die, the Heir of *C.* ſhall vouch as Aſſignee to *B.* So if *B.* and *C.* be infeoff'd with Warranty to them, their Heirs, and Aſſigns, and they both die, and the Heir of the ſurvivor infeoff *D.* he ſhall vouch as Aſſignee *to* B. *and* C. *for the whole Eſtate to which the Warranty was annex'd is lawfully conveyed to him*, and Aſſignees of Heirs, and Aſſignees of Aſſignees, and Heirs of Aſſignees are comprehended under the Word Aſſignees.

The Father is infeoff'd with Warranty to him and his Heirs, and infeoffs his eldeſt Son with Warranty, and dies, the Law gives the Son Advantage of the Warranty made to the Father, becauſe that made to him by the Father is extinct by Act of Law.

But Covenants real often go to an Aſſignee, tho' he be not named; as where a Parcener on Partition covenants to acquit the other of a Suit iſſuing out of the Land; or when a Parſon covenants with the Lord of the Manor of *A.* to celebrate divine Service in a Chapel, Parcel of the ſaid Manor, weekly for the Uſe of the Lord and his Servants; for theſe Covenants are in a Manner appurtenant to the Land. But if ſuch 385.

Covenant

Covenant had been with a Stranger, the Aſſignee ſhould not have an Action of Covenant, for the Covenant can't be anner'd to the Manor, becauſe the Covenantee was not ſeis'd of it.

The Aſſignee of Part of the Land ſhall vouch as Aſſignee, but an Aſſignee of Part of the State, as Leſſee or Donee, ſhall not; but the Leſſee may pray in Aid of the Leſſor, and the Leſſee of Donee may vouch the Leſſor or Donor, *&c.* but if on ſuch Leaſe or Gift the Rem'r in Fee be limited over, the Leſſee or Donee may vouch as Aſſignee.

otherwise had they been compell'd to make Partition

If one make a joint Feoffment with Warranty, and the Jointenants make a Partition by Conſent, the Feoffor ſhall not be bound to warrant their divided Eſtate. Three are jointly infeoff'd with Warranty to them and their Heirs, and one releaſes to the other two, they ſhall vouch; but if he had releas'd to one alone he had extinguiſhed the Warranty for a 3d Part, for as to that, the Releaſee is in by the Releaſe, not by the Feoffment. If two be infeoff'd with Warranty to them, their Heirs and Aſſigns, and one of them make a Feoffment, the (*a*) Feoffee ſhall not vouch, but the other ſhall (*b*) vouch for a Moiety; ſo (*c*) if one of the Feoffees had releas'd to the Feoffor, the other ſhall vouch for a Moiety, for he ſhall not loſe his Warranty by the Act of his Companion; and if there be two Feoffors with Warranty, and the Feoffee releaſe to one of 'em, yet he ſhall vouch the other for a Moiety.

Vide ſupra 254.

(*a*) 385. b.
(*b*) 385. a.
(*c*) Co L. 393. a.

Feoffee with Warranty to him, his Heirs and Aſſigns, makes a Gift T. Rem'r in Fee,

Donee

Donee makes a Feoffment, his Feoffee ſhall not vouch as Aſſignee, becauſe he comes not in Privity of Eſtate, *but by Diſcontinuance, which is always by Wrong*; but he may vouch his Feoffor, and his Feoffor may vouch as Aſſignee. But ſuch a Feoffee may rebut, and ſo may any Ten't that claims under the Warranty, whether he come to the Land by Right or Wrong. But he that claims above the Warranty ſhall not rebut; as if two Brethren be infeoff'd with Warranty to the Elder and his Heirs, who dies without Iſſue, the Younger, tho' he be Heir to him, ſhall neither vouch nor rebut, for he claims not under his Brother but by the Survivor.

Donee with Warranty to him, his Heirs, and Aſſigns, makes a Feoffment, and dies without Iſſue, the Warranty is extinct, becauſe the Eſtate to which it was annex'd is ſpent. But if he had made ſuch a Feoffment before the Statute of *Donis*, the Warranty had remain'd, for then both the Donee and his Feoffee had a Fee-ſimple; but ſince the Statute, an Eſtate T. is look'd upon as a particular Eſtate, and the Donor, who was adjudg'd to have but a Poſſibility of Reverter, has now a Rev'n.

Warranty enlarges not an Eſtate; as if Leſſor releaſe to Leſſee L. and warrant the Land to him and his Heirs.

Aſſignee by Parol, *before* 29 *Car.* 2. 3. ſhould vouch as Aſſignee.

B. is infeoff'd with Warranty to him and his Heirs, and Aſſigns, and infeoffs *A.* who reinfeoffs *B. B.* or his Aſſigns ſhall never vouch, for *B.* can't be his own Aſſignee.

War-

386. Warranty never goes with Burgh *Eng.* or Gavelkind Land to the ſpecial Heir, nor can it deſcend to one of the Half Blood; and neither collateral Warranty, nor lineal with Aſſets, did ever bind the Heir, *&c.* unleſs it deſcended on him.

If two make a Feoffment with Warranty, and one die, the Survivor ſhall not be vouch'd alone, but the Heir of him that is dead alſo; but if a joint Obligation be made by two, and one die, the Action ſhall be brought againſt the Survivor only.

387. If there were two Brothers by divers Venters, and the elder had releas'd with Warranty to the Uncle's Diſs'or, (*before* 4 *&* 5 *Annæ* 16.) and died without Iſſue, the Uncle was barr'd; but if he had died without Iſſue, the younger Brother might enter as Heir to the Uncle, for the Warranty ſhall not bar him, becauſe he is not Heir to him that made it.

Ten't T. makes a Leaſe L. Rem'r in Fee, a collateral Anceſtor confirms the Eſtate of Leſſee, and binds himſelf and his Heirs to Warranty for Term of Leſſee's Life, this barr'd the Entail for Term of Life of Leſſee only. For a Warranty may deſcend to one's Heirs for Term of another's Life on-

388. ly; as Land or Annuity may be granted to one and his Heirs, for the Life of *J. S.* which is no Inheritance, but only a Freehold deſcendible. But a Leaſe Y. or other Chattel, tho' it be granted to one, and his Heirs, ſhall go to his Executors.

The

The Defeating of the Eſtate to which the Warranty is annex'd, defeats the Warranty alſo; as if the Diſcontinuee of Ten't T. were diſſeis'd, and a collateral Anceſtor had releas'd with Warranty to the Diſs'or, this barr'd the Iſſue; but if the Diſcontinuee had entered on the Diſs'or, the Bar was remov'd. So if ſuch a Releaſe were made to the Diſcontinuee's Feoffee on Condition, and the Diſcontinuee after had enter'd for a Breach, the Iſſue might recover.

Warranty may be a Bar to the Heir, tho' it deſcend to him before the Right. And if a Leaſe L. were made to *A.* Rem'r to his next Heir, and *A.* had been diſſeis'd, and had releas'd with Warranty, the Heir was barr'd *before* 4 & 5 *Annæ* 16. tho' the Warranty fell, and the Rem'r came *in Eſſe* at the ſame Time.

But a Warranty ſhall never bar a Right which commences after it is made; therefore if *A.* make a Feoffment with Warranty, and then purchaſe the Seigniory, and the Feoffee *ceſſe*, the Warranty ſhall not bar *A.* of his Writ of *Ceſſavit*. Nor ſhall Warranty ever bar an Eſtate in Poſſeſſion, Rev'n, or Rem'r, that is not deveſted, diſplac'd or turn'd to a Right before, or at the Time when the Warranty was made. Therefore, if the Father be Ten't of Land, and his Son have a Rent or Common out of it, and the Father make a Feoffment with Warranty, this never barr'd the Son of the Rent. And tho' the Son be diſſeis'd after the Warranty, and then the Warranty deſcend, yet he is not bound by it, becauſe he was in Poſſeſſion when

when it was made. So if an Anceſtor had releas'd to my Ten't L. in Poſſeſſion with Warranty, this never barr'd my Rev'n or Rem'r. And if a Woman Grantee of a Rent had married the Ten't, and a Stranger had releas'd to the Ten't with Warranty, he never could have Benefit thereof *as to the Rent, for the Wife's Eſtate therein was not diſplac'd when the Warranty was made; and if the Wife or her Heir afterward bring an Action for the Rent, it muſt be grounded on ſome Act done after the Warranty was made.*

389. But if Ten't T. of Rent diſſeiſe the Ten't of the Land, and make a Feoffment with Warranty; or if Ten't of the Land marry the Grantee of Rent, and make a Feoffment with Warranty; in both theſe Caſes the Feoffee ſhall vouch as of Land diſcharg'd of the Rent, for the Warranty extends to all Things iſſuing out of the Land, and ſecures it in ſuch Plight, as it was in the Feoffor at the Time of the Feoffment made; but inaſmuch as the Rent is a Thing that lies not in Diſcontinuance, the Iſſue or Wife may diſtrain for it, and avoid the Warranty; for it is in their Election whether they will look on themſelves as in Poſſeſſion or not.

Warranty ſhall not bar meer Titles, as by Force of a Condition, Aſſent to a Raviſher, Exchange, *&c.* nor Title of Dower, for theſe remain in their original Eſſence, and

Co. L. 366. b. can't be diſplac'd; *yet it ſeems that tho' a Woman can't be barred of Dower by a Warranty, yet the Ten't in Writ of Dower may vouch the Feoffor,* &c.

In

In Actions which Leſſee T. may have, a Warranty can't be pleaded in Bar; but in thoſe Actions when the Freehold or Inheritance come in Queſtion, the Warranty may be pleaded. *And Damages may be recovered by Force of a Warranty, if a Leaſe T. only be evicted from him to whom it was made.* Ho. 4.

Ten't T. infeoffs his Uncle, the Uncle makes a Feoffment with Warranty, and takes back a State in Fee, and makes a 2d Feoffment without Warranty, and dies, the Iſſue is not barr'd; for the Warranty was extinct by his taking back a State in Fee; but if he had only taken a State T. or L. it had only been ſuſpended during the particular Eſtate; but in the firſt Caſe it is extinct, becauſe no Man can warrant Land to himſelf.

A Man can never vouch as Aſſignee to himſelf, and regularly a Man can't vouch himſelf as Aſſignee of another. But if Feoffee with Warranty to him and his Heirs, infeoff his eldeſt Son with Warranty, and die, it is ſaid that the eldeſt Son ſhall vouch himſelf, and his younger Brother being Heir of Burgh *Eng.* Land, becauſe the Warranty betwixt him and the Father is determined by Act of Law, and it ſeems likewiſe that in that Caſe he may (*a*) vouch the Father's Feoffor. If a Feoffee with Warranty to himſelf, his Heirs, and Aſſigns, reinfeoff the Feoffor and a Stranger, or the Feoffor and his Wife, the Warranty remains; *for tho' the Fee-ſimple of the Warranty and of the Eſtate warranted meet in the ſame* 390.

Vide ſupra 26.

(*a*) Co. L. 384.

ſame Perſon, yet another is jointly ſeiſ'd with him, who would be prejudiced if the Warranty ſhould be extinct; or if two make a Feoffment with Warranty to the Feoffee, his Heirs, and Aſſigns, and the Feoffee reinfeoffs one of them, the Warranty remains, *for the other Feoffor may ſtill warrant the Lands to him that was his Companion, as well as to the firſt Feoffee.*

A Man infeoffs a Woman with Warranty, they marry and are impleaded, he makes Default, ſhe being received ſhall vouch the Husband, tho' the Warranty were then in Suſpence. A Woman infeoffs a Man with Warranty, they marry and are impleaded, he ſhall vouch himſelf and her.

Infant *in Ventre ſa mere* may be vouch'd, if God give him Birth, if not, ſuch a one Heir, but the Infant can't be vouch'd alone, for Proceſs ſhall be preſently awarded.

Ten't T. makes a Feoffment with Warranty, and diſſeiſes the Feoffee, and dies ſeiſ'd, leaving Aſſets, it is ſaid that this ſuſpended Warranty and Aſſets prevent the Remitter, and ſo every one's Right ſhall be ſav'd.

If after the Releaſe with Warranty, the Perſon that made it be attainted, or gain a Releaſe of all Covenants, Demands, or Warranties, the Iſſue is not barr'd, becauſe the Warranty deſcends not to him.

Vide ſupra 122. The Forfeiture on an Indictment of Felony, ſhall relate to the Day on which it was committed, but on an Appeal to the Judgment only.

The

The Defendant waging Battle in an Appeal of Death, was ſlain, and Judgment was given that he ſhould be hang'd, that the Lord might have his Writ of Eſcheat, *quia ſuſpenſus per Collum, &c.* And in *Eire* ſome have been attainted after their Death by Preſentment, *&c.* A Man is ſaid to be convict by Verdict, Confeſſion, or Recreancy, but he is not attainted before Judgment. A Felon convict forfeits his Goods and Chattels, *&c.* but his Lands are not forfeited, nor is his Blood corrupted before Attainder. (a) Contra, Ha. P. C. 16. 391.

If the Party arraign'd for Felony ſtand Mute, he ſhall be adjudged to *pain Fort & Dure*, but ſhall not be attainted; but if one arraign'd for High Treaſon ſtand Mute, he ſhall have ſuch Judgment as if he were convict by Verdict.

Felony *ex vi Termini ſignificat quodlibet crimen Felleo animo Perpetratum*; *Felonice* can be expreſs'd by no other Word; anciently Pardon of all Felonies extended to High Treaſon, but the Law is otherwiſe now; but all Petty Treaſons, Murders, *&c.* are pardoned thereby; a Man forfeits all his Lands in Fee, and Goods and Chattels for ſuch Felonies, for which he ſhall have Judgment to be hang'd, but he ſhall forfeit his Goods and Chattels only for Felony by Chance-Medley, *Se Defendendo*, or Petit Larceny.

Piracy, tho' it be Felony, was only puniſhable by Civil Law, before 28 *H.* 8. 15. and an Attainder thereof by Courte of the Civil Law does not corrupt the Blood, but an

an Attainder by Force of that Statute does. A Pardon of all Felonies does not diſcharge Piracy, becauſe it was a Felony whereof the Common Law took no Conuſance, and the ſaid Statute did not alter the Offence, but only ordained a new Way of Trial, and a new Puniſhment.

Attainder of Hereſy or *Præmunire* corrupt not the Blood, yet *Præmunire* forfeits Lands in Fee ſimple, but Hereſy does not; where a Statute prohibits a Crime, *ſub Forfeiture de corpore & de avoier*, or *ſub foriſfactura omnium, quæ in poteſtate ſuâ obtinet*, or under Pain of being at K.'s Will, Body, Lands, and Goods, this extends not to Loſs of Life or Member; but if the Words are *ſubeat judicium Vitæ & Membrorum*, ſuch Judgment ſhall be given as in Caſe of Felony, and the Blood ſhall be corrupted.

How far the Iſſue of one attainted ſhall inherit, *Vide ſupra* 12.

If Ten't T. be attainted for Felony, he forfeits the Land for his own Life only; but if he be attainted for Treaſon, he forfeits the whole Inheritance by 33 *H.* 8. 20. If the Iſſue in T. be attainted, and then the Father die, he can't enter tho' he be pardoned, becauſe his Blood is corrupted.

392. A Seigniory is granted with Warranty, the Tenancy eſcheats, the Warranty is extinct, becauſe the Seigniory to which it was annex'd is determined.

393. There can be but one Recompence in Value on the Warranty, but there may be ſeveral Recoveries in Value, in reſpect of divers Eſtates; as if a Diſs'or inſeoff Huſband

band and Wife for L. and the Heirs of the Husband who aliens in Fee with Warranty, the Alienee ſhall recover in Value both in *cui in vitâ* by the Wife, and in Entry *ſur* Diſs'in by Diſs'ee. So if one ſeis'd of Rent releaſe to Ter-tenant, and warrant the Land to him and his Heirs, he ſhall recover in Value, both as to the Rent and Land; but for one and the ſame Eſtate he ſhall recover in Value but once.

If lineal Warranty and Aſſets deſcend to the Iſſue, and he alien the Aſſets, and die, his Iſſue ſhall not be barr'd; but if he had brought a *Formedon*, and been barr'd by the Warranty and Aſſets, his Iſſue ſhall be barr'd, tho' the Aſſets be aliened afterwards, for a *Formedon* is a Writ of the higheſt kind Ten't T. can have.

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An Alien is one born out of K.'s Ligeance, (194) who neither can inherit, nor have an Heir, (11) nor claim Dower (49) in common Caſes, (46) nor give the Wife a Title of Dower, (44)

A Denizen ſtrictly taken is one privileged by K.'s Letters Patents, (194) who may purchaſe Lands which may be inherited by his Iſſue born after his Denization, but not by thoſe born before, 2, 11.

An Alien Enemy is diſabled to ſue any Action, (195, 197) but an Alien Amy may ſue any Action in *autre droit*, and any perſonal Action in his own, (293) but can make no Purchaſe but of a Leaſe Y. of a Houſe for his Habitation, 2.

Alienation.

Since the Statute of *Quia Emptores*, an Alienation of Part of a Tenancy to hold of the Lord is good, and the Feoffee ſhall hold *pro Particula*, 62, 63.

The ſame Alienation cannot transfer a Fee to the Alience, and at the ſame Time by Force of any Limitation veſt an Eſtate in another, 483.

A Leſſee may be reſtrain'd by Condition from Alienening, but a Feoffee at this Day cannot be ſo reſtrain'd, or ſubject to a Fine for it, except by Force of a Cuſtom, (63) or Reſervation by K. 312, 313 *Fee* B, D.

Amercement.

The Amercement of the Plaintiff is *pro falſo clamore* as where he is barr'd or nonſuited, or the Writ abates by his Default; the Amercement of the Defendant is for his Delay, and conſequently is ſav'd by a Pardon of the Delay, 191.

It ought to be affeer'd by one's Equals; does not ſubject to Impriſonment; cannot be impos'd on K. Q. or Infant, 191.

The Iſſues of a Juror charge the Land from the Time of the Return, but an Amercement for a Non-ſuit only from the Time it is aſſeſs'd, 157.

Anceſtor. See *Heir and Purchaſe.*

Annuity.

An Annuity is a yearly Payment charging the Perſon only, which is created by Implication of Law on an expreſs Grant of Rent, (216, 222) and continues after the Land, out of which the Rent is granted, is evicted, or the Eſtate charged with the Rent determin'd without any Default in the Grantee, (222) but it ſhall not ariſe on a Reſervation of Rent, or Grant of Rent by Deed, which might have been granted by Parol, (216) nor on the bare Grant of a Diſtreſs, (222) neither does it continue after the Conſideration for which it was granted is ceaſed, 290.

A Writ of Annuity lies not for the Arrears alone

(

382) nor againſt the Grantor's Heir, unleſs he be named; (216) nor againſt any Heir by Preſcription, 157) nor ſeverally againſt each Grantor for an Annuity granted by two, unleſs the Word *Utrumq*; were in the Grant, 216.

Appeal.

In ſome Caſes an Appeal lies for a Woman who can't have Dower, (50) On an Outlawry it cauſes a forfeiture from the Time of the Judgment only, (20, 98) Upon a Nonſuit it intitles not the Defendant to damages againſt the Abettors, (213) It may be brought before the Conſtable and Marſhal for Death out of the Realm, 120. See *Releaſes* L.

Appearance 205.

Appendants.

Appendants are by Preſcription only; Appurtenants may be created by Grant, (180) The Principal muſt be a Thing of perpetual Subſiſtence, (381) and agree with the Appendant in its Nature, 180, 181. Yet if one of them be corporeal, the other muſt be corporeal (180) An Advowſon appendant to a Manor cannot be annexed to a Part thereof without Deed. (277) Royal Franchiſes reunited to the Crown come back again by a Regrant *in tam amplis, &c.* 180. The Appendant paſſes by the Grant or Diſſeiſin of the Principal, (180, 422, 408) and a Diſſeiſin may ſever the Common Appendant before he re-enters into the Land; but he may preſent to a Church, if his Entry be not taken away, (183) yet after his Entry is taken away he cannot recontinue, or be remitted to the Appendant without the Principal, (408, 445) for a Remitter to, or Recontinuance of the Principal, recontinues the Appendant, howſoever they were ſevered before, 445, 463, 464. See *Acceſſory.*

Apportionment. See *Rent and Common, Conditions* B.

Archdeaconry 145.

Arraignment 351.

Aſſembly unlawful 345.

Aſſets.

Aſſets that ſhall bar the Iſſue in Formedon muſt be of an Eſtate in Fee, not a bare Right or Uſe, and deſcend from the ſame Anceſtor, and of equal Value, (479) An Advowſon is Aſſets, and may be extended at the Rate of one Shilling for each Mark of the yearly Value of the Living, (479)

If the Ten't loſe in Formedon, and after Aſſets deſcend, he ſhall recover the Aſſets, and not the Land intail'd, 468. See *Warrant* D, H.

The Profits of Land deviſed to be ſold are Aſſets, 170, 326.

Aſſigns.

The Law will not make Aſſigns by Conſtruction where there may be Aſſigns in Deed, 297. For other Matters, ſee *Covenant*, *Warranty* G.

Aſſiſe.

The Word Aſſiſe has ſeveral Significations; (235) An Aſſiſe of Novel Diſſeiſin lies againſt the Coadjutors as well as the Ten't, (266, 267) An Aſſiſe for a Rent-Charge, or Rent-Seck, muſt name all the Tertenants, (230) Aſſiſe of Rent *in Confinio Comitatûs* is given by Statute, 233.

What Pleas are good in Bar of an Aſſiſe, 317.

Attainder.

A Man is convict by Verdict, but not attainted before Judgment, (498) One attainted of Treaſon or Felony is dead in Law, and diſabled to bring any Action, (195) and can neither inherit nor have an Heir, (11) nor be abſolutely reſtored but by Parliament; yet his Children may inherit one another, (11, 12) Ten't in Tail being attainted of Felony forfeits the Eſtate for his own Life only, but for Treaſon he forfeits the whole Inheritance, (433, 500) If Ten't T. within Age make a Feoffment, be attainted, and die, the Iſſue is put to his Formedon, (433) If the Iſſue in Tail be attainted and pardon'd, yet can he not inherit the Entail, (500)

In Eire ſome have been attainted after their Death

Attainder of Hereſy, Premunire, or Piracy, (by Courſe of the Civil Law) corrupt not the Blood, (12, 499)

Attaint.

No Attaint lies of an Inqueſt of Office, (455) nor of a Verdict affirm'd by more than Twelve, (9)

It lies for K. being ſole Party in a civil Action, but not againſt him, (390)

See *Conuſance.*

Attorney and Servant.

Attornies are Publick or Private, (87) At Law no Attorney could ſue or defend for a Man without a Warrant of Record ſo to do, (192) but any Perſon whatever may be a private Attorney, (87) and warranted by Deed, (84, 87) to give or receive Livery of Seiſin, (84) upon the Land, (89, 90) But ſome ſay he can't be authorized by Indenture unleſs he be Party, (89)

If he purſue not his whole Power, his Acts are totally void, (89, 345, 346) yet if he perform the Subſtance, the Law regarded not Form, (87) and if he exceed his Authority, his Act is only ſo far void, (346)

B.

A Claim within View by a Servant commanded by a Maſter, being in Health, and at large, to claim upon the Land, is void notwithſtanding any Fear in the Servant, (345, 346)

What one does merely as Attorney to another, ſhall not prejudice his own Intereſt, (88, 89)

Attornment.

Attornment is an Agreement to a Grant (409) which muſt be had in the Life of the Grantor and Grantee, (409) but may be made by the Heir after the Death of the Ten't who ought to have attorn'd, (416) and may be either expreſs or implied; as by Acceptance of the Deed, where he who ought to attorn was Party to the Grant, (413, 414, 417) or by Payment of Rent after Notice of the Grant, (409) Alſo it may be ſupplied by what is Tantamount; as by Re-entry of a

Leſſee on the Feoffee of his Leſſor who had ouſted him, &c. (418, 419)

B.

It was never required where there was a Privity before between the Grantee and him who ought to have attorn'd, (417, 418) or where the Grantor himſelf had the Eſtate in reſpect whereof the Attornment was required, (419) or in Deviſes, Extents, or Conveyances operating by Way of Uſe, if the Grantor himſelf had no Need of it, (420, 421) Neither was there any Want of it in a Fine, but only to give a Privity to diſtrein, (417) And this the Law gave to the Lord Paramount upon an Eſcheat to him from the Conuſee before or after Attornment, (420) But it was neceſſary in all Grants (409) by Subjects (415) of Services, (except thoſe of Tenants or Copyholders) (406) Reverſions, (411) Remainders (408) and Rents, 407, 408. See *Diſſeiſin* A.

C.

It might be countermanded by enlarging the Eſtate of the Tertenant, or marrying a Huſband ſtranger to the Grant, (405, 406)

An Attornment to ſeveral Grants, (406) or to a Grant made by Way of Remainder, when there can be no particular Eſtate, is void, (405) But an Attornment to disjunctive Grant, (406) or where the Quality of the Thing granted is alter'd before the Attornment, is good, (404) An Attornment by one Jointenant is good for all, (411, 413) And an Attornment by the Huſband binds the Wife, (408) And an Attornment for Part of a Grant 409, 410. or by Part of the Services, (410) is effectual for the Whole.

And the Thing granted paſſes *ab initio*; but not ſo to charge the Tenants in the mean Time, (411)

D.

To all Grants of Reverſions, Remainders, and Services, the Perſon immediately privy to the Grantor ought to have attorn'd, (412, 413, 416, 417, 418)

Either

Either Ten't by Curtesy after Assignment, or the Assignee, may attorn, (416) To Grants of Rent-Charges, the actual Freeholder ought to have attorn'd, (412, 413.)

E.

All Persons were compellable to attorn in a *per quæ Servitia*, (417) And Infants being Ten'ts L. were compellable to attorn in a *quid Juris clamat*, (416) But Persons of full Age being Ten'ts L. could not be compell'd unless the Grantee would allow their Privileges, which would be lost by a general Attornment, (419, 420) And Ten't T. *apres* was not compellable in any Case to attorn in a *quid Juris clamat*, (417) and no Persons whatever were compell'd to attorn to defeasible Grant, (419)

Averment.

Averment is either General or Particular, (463) The General is that which is used in the Conclusion of all Affirmative Pleas except Courts, (403) The Particular is the Avouching of any Thing in Particular, (463) which is not required as to what appears in the Record it self, (404)

The Demandant cannot avet his Writ on the Ten't's Disclaimer where no Damages can be recovered, (462)

Avowry.

Avowry is not so much in the Right as Assise; (360) there are four Kinds of it, (361)

Where there is Ten't at L. with Remainder over, the L'd ought to avow on the Ten't L. (412) Also he ought to avow on his Ten't notwithstanding he be disseised, (357, 359) and he may avow upon him, after he has made a Feoffment over, till the Feoffor die, or the Feoffee tender the Arrears; and if he avow on the Feoffee, before the Law compels him so to do, he has no Remedy to recover his Arrears, (359, 360) but by 21 *H* 8. 19. He needs not avow on any one so certain, yet he must alledge Seisin within forty years, and observe all other *Incidents*; and the Ten't

ſhall have all Advantages except Diſclaimer, (358, 359) See *Feoffment and Remainder.*

Authority.

An Authority concerning the Publick, (264) or coupled with an Intereſt, given to more than one, ſhall go to the Survivor, (169, 267) but a bare private Authority ſhall not, unleſs it be limited to the Survivor, (169, 267) neither can it be executed but by all the Perſons authorized, (83, 267) eſpecially if they be nam'd by their proper Names, and the Thing be to be done immediately, (169) But by Statute, if Part of Executors, who have Power to ſell Land, refuſe, the reſt may, 170. See *Releaſe*, B.

The Deviſe of a Power to ſell enables one to ſell a Thing lying in Grant without Deed, (169) and to ſell Part at one Time, and Part at another, (170) but prevents not the Deſcent of the Thing to be ſold, (169) See *Deviſe.*

In pleading Authority, it muſt appear that the Subſtance was purſued, 404. See *Attorney.*

Ayd. See *Aid.*

Bailee 141, 448.

Bailiff.

Account lies only againſt a Guardian in Socage, Bailiff, or Receiver, (259)

A Bailiff ſhall Account for what he might have got, and be allowed his Expences, (253) ſo ſhall not a Receiver, except he be a joint Merchant, therefore a Bailiff ſhall not be charged as Receiver, (258)

Robbery of the Goods is a Diſcharge in all Caſes, except that of a Carrier, or Pawn-Broker, who would not ſuffer them to be redeem'd, 141.

Baniſhment 202

Bar. See *Aſſiſe and Pleading.*

Bargain and Sale 224, 272, 335.

Baron and Feme.

A.

A Male may conſent to Marriage at 14, a Female at 12, (129)

At this Day no Degrees but the Levitical make a Marriage unlawful, (324)

At Law the Marriage of a Prieſt was voidable, of a Monk or Nun void, (208)

Divorces of unlawful Marriages are *a Vinculo*, others *a Menſa & Thoro*, (324.)

B.

Marriage gives the Husband a Freehold in the Wife's Land, but meerly in Privity, (446) It alſo gives him a Privity in reſpect of her particular Eſtate to enlarge his own Intereſt by Releaſe, &c. (365, 396, 397) and Law gave him Power to diſcontinue, (See *Diſcontinuance* B.) But never to defeat her Right to a Freehold, (256, 257, 397) or to a bare Poſſibility; (72) yet it gives him the abſolute Property of her own proper perſonal Chattels in Poſſeſſion, (448) and the Poſſeſſion of her Chattels real, and the whole Intereſt if he ſurvive, and a Power to alien the whole, or Part, during her Life, (71, 72, 447) but not charge them without Aliening. (270, 447) Alſo it impowers him, during her Life, to releaſe or recover either real or perſonal Chattels being in Action, (447) And either in her Life, or after her Death, to preſent to Churches void during the Coverture, (175, 448) and alſo by Force of the Statute to recover Rent in Arrear before or during the Coverture, 251, 447.

C.

No Man (except K. 202) can give Land to his Wife, but by Way of Uſe or Deviſe, (168) yet by his Releaſe, enuring by Extinguiſhment, he may perfect a defeaſible Remainder in her, (394)

Alſo a Wife can't ſell to her Husband but as an Inſtrument to another, (168) nor can ſhe deviſe Land to him, (168) nor ſue or be ſued without him, unleſs he be abſolutely baniſhed, (202) yet being received on his Default, ſhe has the ſame Advantage as if ſhe were ſole, and in ſome Caſes more, (409) and may vouch the Husband, (997)

There are no Moities of a joint Eſtate executed in Huſband and Wife during the Coverture, conſequently ſhe muſt recover, or be remitted to the whole, or not at all, (273, 448, 452)

D.

A Fine levied by the Wife alone may be avoided during the Coverture, (71, 449) Alſo a Fine levied by the Husband alone is tortious, (486, 487) but a Fine by them both is unavoidable, (449) But other Acts done by them both are look'd upon as the Acts of the Husband only, 448, 457, 458.

E.

A Feme Covert can't be a Diſſeiſoreſs by Command, or Agreement, but only by her own proper Act, (458) If ſhe be diſſeis'd during the Coverture, and a Deſcent caſt, yet ſhe loſes not her Entry, (337) And if ſhe purchaſe an Eſtate during the Coverture, her Husband may wave it, and ſo may ſhe her ſelf after his Death, (3, 457) Tho' it were made by Indenture or Fine; (448, 449) If ſhe purchaſe two Eſtates, ſhe may chuſe either after the Husband's Death, (457) yet by taking back an Eſtate, ſhe ſhall be remitted to an ancient Right, (448, 453, 457) and being receiv'd on the Husband's Default may plead ſuch Remitter, (449, 454) neither can ſhe, nor her Huſband, by any Diſagreement after, avoid her being remitted, (457) Tho' the new Eſtate were made by a Diſſeiſor, provided ſhe were not of Covin with him, 458. See *Conditions* M.

Baron and Barony. See *Nobility.*

Barretry 471.

Baſtard.

One born in Marriage, or within 9 Months after his Father's Death, (12, 184) cannot be baſtarded, if the Husband were within the four Seas, and not apparently diſabled, 33, 334.

A Baſtard is *nullius filius*, therefore can't be a Villain but by Confeſſion, (184) Is not a Child within the

the Statute of Wills or Uſes; (121, 184) cannot be Heir; (10) nor take by any Limitation made before he was born; yet he may purchaſe by his reputed Name, (4) And if a Baſtard Eigne, (334) or his Iſſue, (333) receive a Rent reſerved on a Leaſe L, (22) or enjoy any other Hereditament in Fee-ſimple as Heir, (333) without Interruption during Life, (334) and die ſeiſed, and a Deſcent be caſt, (332, 333) Or if a Baſtard Daughter Eigne be allowed to make Partition with the *Mulier*, (256) the Mulier, and all others, are barr'd for ever. 333. See *Agreement*.

The Trial of Baſtardy is by the Biſhop's Certificate. 119, 452.

Biſhops.

All Biſhops hold by Barony, (116, 148) Have been called by Writ to Parliament, (148) Were anciently made *per Traditionem Annuli, &c.* (439) Have an abſolute Fee, (111, 437) Pay no Relief but by Grant or Preſcription, (116) Can be written to by none but K.'s Courts of Record, (204) Their Privation, *&c.* avoid Acts tending to diminiſh their Revenue as much as their Death, but not others, (426) *Canterbury* is *Primas totius Angliæ, York Angliæ, &c.* 144. See *Certificate, Excommunication and Aid.*

Borough Engliſh 164. See *Gavelkind.*

Boſcus 6,

Burgage 163.

Burgh 163, 164, 174.

By-Law 164. See *Cuſtom* A.

Capacity. See *Purchaſe and Corporation.*

Capite.

A Tenure in Capite is commonly ſpeaking a Tenure of K. as of his Crown, (118, 163) Kt. Service in Capite drew to K. the Wardſhip and Livery of all the Heirs Hereditaments whatſoever, if he were within Age, and primer Seiſin and Livery, if he were of full Age. (124) Socage in Capite required primer Seiſin of

of the Land ſo holden, (125) But a Tenure of K. as of an Honour, &c. gave him no ſuch Prerogative, 125. See *Deviſe.*

Caſtle-guard 131, 132, 135.

Cauſa Matrimonii prælocuti, 290, 316.

Certificate.

In what Caſes the Trial ſhall be by Certificate, (119)

Certificate of Mulierty may be confeſs'd and avoided. (452)

On the Iſſue *N' Unques accouplez*, &c. in Dower the Biſhop ought to certify that the Parties were lawfully married, tho' they were under the Age of Conſent, or might have been divorced, 49, 50.

Ceſſavit 228, 233, 485.

Challenge.

Challenges are either to Array, (236) which muſt be taken firſt, (246) or to the Polls, (236) which cannot be taken for ſuch Cauſe as might have been alledg'd againſt the Array, (246) Either of them may be for divers Cauſes, (246) and are either Principal, (236, 238, 240) or to the Favour, (233, 239)

They cannot be taken by a Defendant againſt whom the Inqueſt is awarded by Default, (243) But they have been allowed in a Writ to enquire of Waſte, &c. 245.

Any Partiality, (236) or Malice, or Want of Power in the Officer, (237) or his being of Kin to, (238) or under the Power of the Party, (237) or not returning a Knight where a Peer is one Party, (237) are good Cauſes of a principal Challenge to the Array.

The Array of the principal Panel muſt be tried before that of the Tales, (244) when the Array is quaſh'd, Proceſs ſhall be awarded to the Coroners, (239) and ſuch Proceſs may be pray'd at firſt by the Plaintiff, on a Suggeſtion that the Defendant may have a principal Challenge to the Array, 238, 239.

Challenges

Challenges to the Polls are Four-fold, (239,) Any Subject, (240) not being a Peer, (240) may in High Treaſon Challenge peremptorily 36. In other Caſes of Life at this Day but 20, (239) on a joint Venire, a Juror challenged peremptorily as to one, ſhall be drawn as to all, 240.

A Juror may be challenged principally for four Cauſes. 1. For his Dignity as being a Peer, (240) 2. For a Defect; as not having 10 *l.* Freehold in Eſtate, or Uſe, (364) being an Alien, Villain or under Age, (240) 3. For actual Partiality or Malice; as being of Kin, a Witneſs in the Deed, having given a Verdict before, having been an Arbitrator, having taken Money, having indicted the Party for the ſame Cauſe, &c. (241, 242) 4. For ſome Offence; as being outlawed or Infamous, 242.

Challenges for the Hundred are now ouſted in all Cauſes meerly civil, (242) He is a good Hundredor who lives, or has a Freehold in the Hundred, or one of the Hundreds, where the Cauſe of Action ariſes in ſeveral, 243.

Challenges to the Favour are infinite, 242.

In Appeals, or where K. is Party, or where a Challenge to the Array has been found againſt the ſame Party, the Cauſe muſt be ſhewn preſently, (244)

Challenges of the Array or the Polls, ſhall, if no Jurors be ſworn, be tried by two of thoſe impanell'd, to be appointed by the Court, (244, 246) Thoſe which found not in Reproach ſhall be examined by the Jurors Oath, 245.

Champerty 472.

Chapter 145. See *Corporation.*

Charters. See *Deeds* and *Dower.*

Chattels 176. See *Heir* E.

Church. See *Advowſon.*

City 164.

Claim. See *Continual Claim.*

Common.

Common Appendant belongs of common Right to arable Land for Beaſts of the Plow, (181) Common Appurtenant is for other Beaſts, and muſt be by Grant or Preſcription, (182) Neither of them impower to put in a Stranger's Beaſts, (183) both ſhall be apportion'd Alienation of Part of the Land to which, &c. (182) But common Appurtenant is extinct by the Commoner's Purchaſe of Part of the Land, in which, &c. (182) Common *pur Cauſe de Vicinage* is but an Excuſe of Treſpaſs, (182) Common in Groſs muſt be by Grant or Preſcription, (182) Common *ſans Nombre en groſs* cannot be divided, (253) nor apportioned, (228) nor ſhall it go to the Lord on the Purchaſe of a Villein, (174) nor give a Woman Title of Dower; (46) yet it ſhall not be extinct by a Deſcent of Part of the Land to the Commoner, 228.

Whatever the Nature of the Common be, whether certain or uncertain, a Preſcription for it cannot exclude the Owner of the Soil; as a Preſcription for the ſole Paſture for a certain Time may, 182, 183. For other Matters, ſee *Appendant* and *Extinguiſhment.*

Condition.

A.

A Condition may defeat, enlarge, or create an Eſtate, (285) It may either defeat the whole, or Part of the Eſtate, (305, 307, 330) in the whole, or Part of the Land, 287.

Conditions are either in Deed or in Law, (285) A Condition in Deed is created either by an expreſs Clauſe that the Party may re-enter, (285, 289) or that the Eſtate ſhall ceaſe, or be void, (304, 384) if ſuch a Thing happen; or by the Words *Sub Conditione, ita quod,* or Proviſo that the Party do ſo or ſo without more immediately following the granting Clauſe, (288, 294) or by the Words, that a Leſſee Y. ſhall do ſo or ſo, on Pain of Forfeiture, (290, 302) Or by *Pro* in the Grant of a Thing executory, or by *Cauſa Matrimonii*

prælocuti

locuti in a Feoffment by a Woman (290, 316) Or by *Intentione, &c.* in a Grant by K. or in a Will (290, 26) But *Quære*, if the Party's Intent, not expreſſed n a Feoffment, can make an Eſtate conditional (312)

Eſtates executed can't be defeated by Defeazance nade after, Eſtates executory may, (326)

Remainder Man is bound by the Condition in a Deed by which he claims, tho' he never ſealed it, 20.

B.

A Manumiſſion or Attornment cannot be upon a Condition ſubſequent, (367) But any Releaſe, (except of a Condition) Surrender, (207) K.'s Pardon, or Grant of Denization, may (367) and any Grant whatever may be on a Condition precedent, 367.

A Condition may be extinguiſhed by a Releaſe of the Feoffor, either expreſs, (393) or implied, as by a Feoffment made by him, *&c.* (327) See *Releaſes.* By a Feoffment made by the Feoffor's Heir apparent, it is ſuſpended after the Anceſtor's Death, and revives afterwards, (484) But it cannot be apportioned but by the Act of Law, or of K. 304.

C.

A Feoffment on Condition to do what is *malum in ſe* is abſolute, a Bond is void, (293) A Bond or Feoffment to do a Thing, either in it ſelf, or legally impoſſible, are abſolute (293, 294) A Condition in a Conveyance, repugnant to the Eſtate conveyed, is void, but in a Deed collateral is good, (252, 293) See *Alienation &* See A, E, B.

Where the Condition of a Feoffment, being for the Feoffee's Benefit, becomes impoſſible without any Manner of Default in the Feoffee, the Feoffment is unavoidable; but if the Condition of a Bond, *&c.* become impoſſible, by the Act of God, the Bond is ſaved, (291, 293, 310) If a Feoffee, bound by Condition to make a Refeoffment, become diſabled, either by any Laches of his own, (310) or by an Incumbrance, actually

actually charging the Eſtate done or ſuffer'd by him the Feoffor may re-enter, notwithſtanding ſuch Diſability be afterwards removed, (311) But if a Feoffor be diſabled by Attainder, or otherwiſe to perform a Condition on his Part, and at the Day the Diſability be remov'd, he may perform it, (311, 312)

Where the Feoffee is bound to make a Refeoffment, and the Feoffor dies, the Feoffee muſt make the Eſtate to his Heir, *&c.* (308) If more than one were to take, and all die, he muſt make it to the Heir of the Survivor, to hold to him and the Heirs of the Survivor, (308, 309) If a Mortgagor die before the Day limited for Payment, his Heir or Executor may pay the Money, (291) But where no Day is limited, they cannot, (295) If *A.* being infeoffed on Condition to pay Money, infeoff *B.* either of them may pay it (295) Where the Condition is, that the Mortgagor and *J. S.* pay the Money, and one of them die before the Day, the other may pay it, (309) If a Mortgagee die, the Money muſt be paid to his Executors, unleſs the Heir be expreſly named, (297) where it is impoſſible to paſs the very Eſtate mentioned in the Condition, either through a Miſtake of the Nature of it, (309) or an Act of God ſubſequent, it is ſufficient to paſs another as near it as may be, (308) Alſo, where-ever an Eſtate to be conveyed by Force of a Condition, is conveyed in Subſtance, the Law regards not the Omiſſion of a Privilege, (308) or changing the Kind of the Conveyance, (294) and a Condition to pay Money to one who is a Party to the Deed, may be ſatisfied by the Acceptance of any other Thing in full Satisfaction, (296, 230) but not by Acceptance of a leſs Sum at the very Day and Place in the Condition, unleſs the Whole be acquitted under Seal, (300) neither can a collateral Condition be ſatisfied by the Payment of Money, 301.

D.

A Tender in Bags of Foreign Money, current by Proclamation, is good, (293) And in ſome Caſes a Tender refuſed diſcharges the Party for ever, as where the

the Money tender'd by a Feoffor to the Feoffee was made payable in Nature of a Gratuity, (293) Or where the Thing tendered by the Obligor is collateral, (296) Or conſiſts of *Bona peritura*, (294) Or is contained in a Defeaſance, (294) Or where the Condition is that one Stranger ſhall infeoff another, (296) Or that the Feoffee ſhall only make a particular Eſtate, (296) But if the Condition be to pay Money, or make a Feoffment to a Stranger, a Tender refus'd is a Breach, (295, 296) If the Condition of Feoffment be to pay Money lent, (293) or the Condition of a Bond be to pay a leſs Sum to the Obligee, (293) a Tender refuſed ſaves the Penalty only.

E.

It is ſafeſt to appoint a certain Day and Place when and where a Condition ſhall be performed, (299) If no Day be limited, a Mortgagor has Time during Life to pay the Money, (295) alſo an Obligor may at any Time perform a Condition requiring his ſole Labour, and can't be haſten'd by Requeſt, (297) One bound by a Condition in a Bond or Feoffment, to make a Feoffment to the Feoffor, (295) or to the Feoffor and a Stranger (309) or that one Stranger ſhall infeoff another, ſhall ſave it by a Performance at any Time, if he be not haſten'd by Requeſt, (295, 296, 299) But an Obligor bound by a Condition to do a tranſitory Act, or ſuch a local Act as may be done in the other's Abſence, (295) or Executors to whom the Land is deviſed to be ſold, (32) muſt at their Peril do it preſently. One bound to grant an Annuity, payable yearly at *Eaſter*, muſt grant it before the next *Eaſter* (296, 297) An Obligor or Feoffee, on Condition to infeoff a Stranger, muſt do it preſently at their Peril, and alſo give him Notice (295, 309) If one be bound to pay Money at a certain Place any Time during his Life, he may pay it whenever he finds the Party there; otherwiſe he muſt give Notice when he will pay it (298) If *A.* be bound to *B.* that *C.* ſhall infeoff *D.* on ſuch a Day, *C.* muſt give Notice to *D.* thereof, and requeſt

requeſt him to be ready on the Day, (298) If no Place be limited, an Obligor and Mortgagor muſt ſeek the Obligee and Mortgagee, if in *England*, and pay the Money, (294, 297) Alſo a Feoffee, &c. bound by a Condition to pay a Rent to a Stranger, which is in Truth but a Sum in Groſs, muſt at his Peril ſeek him, &c. (300) But a Man is not bound to tender Rent any where but upon the Land, 298.

Of a Condition in the Copulative both Parts muſt be perform'd, of a Diſjunctive either Part is ſufficient, 313.

F.

No one ſhall take Advantage of the Non-performance of a Condition, who is himſelf the Cauſe thereof, (292, 293) And at Law no one, who was not Heir or Succeſſor, or Executor of the Leſſor, &c. could take Advantage of a Condition, which determines not the Eſtate without an Entry, but of others a Stranger always might take Benefit, (301, 302) Not the Wife, but the Executor of the Husband, ſhall enter for the Breach of a Condition reſerv'd by the Husband, on the Grant of the Wife's Chattel by him, (72) alſo the Husband's Heir ſhall enter by Force of a Condition, annexed by the Husband to a Feoffment of the Wife's Land, but his Eſtate ſhall preſently vaniſh, (286, 431, 432) By 32 *H.* 8. 34. any Aſſignee (either by Conveyance at Common Law, or by Way of Uſe with Notice,) having the Whole, or Part of the Reverſion of the whole Land, may take Advantage of a Condition annexed to any Leaſe, being for the Benefit of the Eſtate, or Payment of Rent, (302, 303) But a Lord claiming by Eſcheat or Mortmain is not within this Act, 333, 304.

G.

There can be no Re-entry by Force of a Condition for Non-payment of Rent without a Demand, (285, 286. See *Demand*) Neither can any Condition annex'd to a Freehold of a Thing lying in Grant, or Livery, by Conveyance at Common Law, or by Way of Uſe, or

or Deviſe, by the ſtrongeſt Words, &c. defeat it without an Entry or Claim, (302, 305) unleſs he who is to take Advantage of the Condition be in Poſſeſſion of the Land, and the Condition not ſuſpended by his Poſſeſſion, (305, 306) or unleſs the Purport of the Condition be only to leſſen the Eſtate, and the Party be ſtill to continue in Poſſeſſion of a remaining Intereſt, (304, 306) But a Limitation of any Eſtate, and a Condition of a Leaſe Y. that it ſhall ceaſe, &c. require no Entry, 302, 323.

H.

Whoever claims by Conveyance, &c. cannot plead a Condition to defeat a Freehold without Deed, (314, 315) but he who comes in by Act of Law need not ſhew the Deed, unleſs it belong to him, (314) and if the Feoffee take away the Deed wrongfully, or there be a Remitter to an Eſtate above the Condition; or he who pleads a Re-entry make no Title by it, there is no Need to ſhew any Deed, (315) Alſo on the general Iſſue the Jury may find a Re-entry without Deed, (315, 316) and one may plead a Condition annex'd to a Chattel without it, (315) If a Feoffor re-enter, and get Poſſeſſion of a Deed-Poll, he may plead it, tho' it belong to the Feoffee, 319, 320.

I.

If one diſtrain, or bring an Aſſiſe, or accept of Rent due at a later Day after a Condition broken, he diſpenſes with that Breach, (298) But a Leſſor Y. may receive the Rent, the Non-payment whereof was a Breach, and yet enter, 298.

K.

A Grant for Years of a Thing which may paſs without Livery, with a Condition to have the Fee on the Performance of ſuch an Act makes a Condition precedent, (311, 505) but ſuch a Grant of Thing lying in Livery is of no Force to paſs the Fee without Livery, but with Livery, makes the Condition ſubſequent againſt the expreſs Words, (304.)

If a Condition precedent become impoſſible by the Act of God or the Party, (292, 305) or if there ariſe an

an Uncertainty in whom the Eſtate ſhall veſt, (305) the Eſtate ſhall never ariſe.

L.

All Grants of Offices are ſubject to this Condition in Law, That the Grantees duly execute them, 323. See Office.

M.

All Conditions in Law requiring Skill and Confidence, like Conditions in Deeds bind Infants and Feme Coverts, (321) Other Conditions implied by Common Law or Statute, do not abſolutely deſtroy their Eſtates, except in the Caſe of Waſte, 322.

N.

Regularly the Feoffor, *&c.* re-entring, regains his former Eſtate, (287) but can't be reſtor'd to a Right or Privity which was abſolutely deſtroyed, (43, 159, 287, 306) or forfeited by the Feoffment (288, 340) or determined after, (287) And if the Words were, That he ſhould hold the Land till he be ſatisfied for the Rent behind, he gains no Freehold by his Re-entry, and loſes his Intereſt by a Tender of the Arrears, (288) But the Profits ſhall not go in Satisfaction, unleſs the Words were, Until he be ſatisfied thereof, 288.

Whoever re-enters or recovers by Force of a Condition in Law, muſt take the Land with all its Incumbrances, (228, 322, 435) except a Leſſor recovering for Waſte, who ſhall avoid a Leaſe made by his Leſſee, 322.

Confirmation.

General Words of Gift or Grant may amount to a Confirmation, *non è Converſo*, 400.

A Confirmation of a void Eſtate or future Intereſt, is of no Force, (391, 392, 407) It may ſtrengthen a voidable Eſtate without Privity, (391, 408) but cannot enlarge an Eſtate, unleſs it may be made by him in Reverſion or Remainder to the particular Ten't, (391, 408) and have alſo apt Words of Enlargement, (395, 396)

A Joint Eſtate enlarged, continues Joint. And Eſtate in

in Common continues in Common, (396, 397) a Confirmation of a Joint Estate, either by one Jointenant to another, or by a Disseisee, will not sever it, nor extinguish a Right, or Rent suspended without special Words, (395, 396)

A bare Confirmation by a Lord of his Ten't's Estate operates nothing, (406) yet by special Words it may abridge the old Services, but cannot reserve new, 335, 407.

Land may be confirm'd to a Lessee Y. for Part of the Term, but not to a Freeholder, (388) If Lessee L. make Two voidable Leases, the Lessor's first Confirmation shall stand, 392.

B.

At Law a Confirmation by the Chapter of a Grant by the Bishop, or of his Deed before or after Livery, 399, or by the Ordinary, and Patron having an absolute Fee in the Patronage, of a Grant by a Parson in the Parson's Life, made it good for ever, 398, 399, 436. But a Confirmation by a Diss'ee of a Diss'or's Deed, is of no Force, 399.

C.

Whatever any Entry may defeat, a Confirmation will make good, wherefore made by a Diss'ee or Feoffor upon Condition, *&c.* 397, 398. If my Disseisor grant a Rent to me, and I grant it over, I confirm it, 400. A Lessor L. having an absolute Fee, and confirming a Grant of Rent in Fee by the Lessee, makes it good for ever, 399, but a Confirmation by one who has a qualified Fee, ceases to be of any Force when the Right of him who makes it is determined, 398.

If a Diss'ee having Right of Entry join in a Feoffment with the Ten't, the First passes the Land, the Second but confirms it, 400. See Remainder.

Consanguinity.

How the Degrees thereof shall be computed, 33, 34.

Conſideration valuable 5.

Continual Claim.

Continual Claim made by one whoſe Entry is Lawful in reſpect of a Diſs'in, or Forfeiture, did at Law ſave his Entry againſt any Deſcent within a Year and a Day after the Claim made, 338, 342, and at this Day ſaves it againſt any within five Years, 343. It re-continues his Eſtate who makes it, and defeats the Eſtate of the Tertен't, and makes his Occupation afterwards a Diſs'in, and puniſhable in an Action of Treſpaſs, *&c.* 343, 344.

If the Party dare not enter for fear of bodily Harm, his Claim as near the Land as he dares go, 341, has the ſame Effect for his Advantage, but not for his Diſadvantage, 342. Alſo his bringing an Action amounts to a continual Claim, ſo as to ſave his Entry againſt a Deſcent Caſt hanging the Suit, 349.

A Claim by the Anceſtor, 334, 335, or particular Ten't, 338, help the Heir or Remainder Man, who could not Claim themſelves. See Attorney B. and Entry B.

Conuſance 205.

It is not grantable in *Quare impedit* 204, nor Attaint 389.

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Copyhold.

Copyhold is a baſe Tenure 104, 107, created by the immemorial Cuſtom of a Manor, as to Tenements within the ſame, 103, 105, which have been demiſed or demiſable by Copy, Time out of Mind, 105.

Tenements ſo holden are forfeited by any Waſte done or ſuffered, 109, and alſo by any Leaſe thereof for more than one Year, or any other Conveyance (except Surrender) which transfers an Intereſt to ſuch Land; but not by a Releaſe of a bare Right, 105.

B.

The Form of a Surrender, 105.

The Surrenderee is in by the Surrenderor, 105.

A Surrender to the Lord out of Court needs no particular

icular Cuſtom to warrant it, as a Surrender to o-hers out of Court does, 106, 108. Such a Surrender aſſes the Eſtate on Condition ſubſequent that it be reſented at the next Court, 106, 109.

Any one who is lawful L'd for the Time may make oluntary Grants of Copyholds, and even Diſs'ors may ake Admittances, 104, 105. And the Leſſor of a Manor is bound to admit, according to a Surrender aken by his Leſſee, 107.

No Copyholder can bring an Action in K.'s Courts, 07, againſt any but the Lord himſelf, 108.

A Fine may be due on any Change of the Ten't hatever, and on the Change of the Lord by Death, nd of the Reaſonableneſs thereof the Court ſhall udge, 106.

C.

Weſtminſter 2. extends only to ſuch Copyhold Ma-ors, which by Cuſtom had Eſtates T. before 106, 107. or other Matters ſee Courts.

Cornage 115, 162.

Corporation.

All Corporations are by Patent or Preſcription, 144, nd are either Sole or Aggregate, 110.

Any of the latter may take a Chattel in Succeſſion, ut none of the former except K. 12.

Of Corporations aggregate, ſome conſiſt of Perſons ll capable, others of a Head only capable, and the eſt dead in Law, 110, 145. If the latter be tranſlated nto the former, the ſame Body in effect remains, 158.

In many reſpects ſuch Corporations differ; for the ead of the latter agrees with a ſole Corporation, in he Power to diſcontinue, 423, 442, to do or receive omage, 110; to act in Perſon without being neceſſi-ated to make an Attorney, 110; to take or tranſ-er without Deed, 134, 145; but not without the Word ucceſſors, 145; in taking advantage of Protection, 95; in being diſabled by Excommunication, 203, 04; in not being able to autherize Livery after

Death by Force of a Deed of Feoffment made in his Life, 86, 87; not to bind his Succeſſors without Conſent of others by Alienation, 399, Forejudgment, 154, or Diſclaimer, except in *Quo Warranto*, 159, or ſuffering a Recovery, except in a Perſonal Action, 159. But neither of them take in the Vacancy of the Headſhip unleſs by Way of Remainder, 350.

Any Leaſe or Grant except of antient Offices of Neceſſity, 66, not conformable to the Rules preſcribed by 63 & 13 *El. &c.* if made by a ſole Eccleſiaſtical Corporation, may be avoided after the Leſſor's Death, if by one Aggregate, after the Death of the Head, 67. See *Diſcontinuance*, *Confirmation*, and *Eſcheat*.

Corruption of Blood. See *Attainder*.

Cottage 101.

Covenant.

Where a Covenant in Deed ſhall deſtroy a Covenant in Law, 488.

Covenants real, often go to an Aſſignee without naming him, 491.

How the Performance of a Covenant is to be pleaded, 405.

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The Court ſhall judge of the Reaſonableneſs of Copyhold Fines, 107, of the Time which Ex'ors ſhall have to remove the Teſtator's Goods, 101; what ſhall make a Voyage Royal, 114, may adjourn a Cauſe of Difficulty into the Exchequer Chamber, 116.

Courts of Record hold Plea of Actions *Vi & armis* and of thoſe which are for 40 *s.* or more, 175, 346, and can be created only by Patent or Preſcription, 346. Their Records are not traverſable, neither can they be altered after the Term, 346, or rectified but by Writ of Error, 175. Writs returnable in Q.'s Bench

are *coram Nobis ubicunq*; thoſe in Common Pleas, *coram Juſticiariis apud Weſtmonaſt'*, 116.

Courts-Baron muſt be holden within the Manor, 103. Of the Freeholders Court the Suitors are Judges; of the Cuſtomary Court the Steward, 103, 104.

Eccleſiaſtical Courts regularly have Juriſdiction of Matters remediable at Common Law, 147, 148.

Curteſy.

If one have Iſſue by his Wife, born alive in her Life, 42. and the Wife at the Time, or before, or after, 41, 42. be ſeiſed of a Freehold, and Inheritance, tho' ſuſpended for Years, 41. which by any Poſſibility might deſcend to ſuch Iſſue, 57. he ſhall be Ten't by *Curteſy*, 41. if the Wife were not attainted before Iſſue had; 57. but if the Wife's Eſtate be defeated by Remitter, or the Failing of the Foundation on which it depends, the Title to the Tenancy by *Curteſy* falls with it, 42.

A Man is Ten't by *Curteſy* initiate by having Iſſue, and his Feoffment is no Forfeiture, but gives a good Title during his Life, yet it ſo far extinguiſhes his Title to be Ten't by *Curteſy*, that no Re-entry can revive it, 42, 43. But a Man is not Ten't by *Curteſy* conſummate till his Wife's Death, 44.

An actual Seiſin, where impoſſible, is not neceſſary, 23, 41.

Cuſtom. A.

No Cuſtom or Preſcription is allowable, unleſs it have been uſed Time out of Mind, in a peaceable uninterrupted Courſe, and the contrary thereof be not in the Knowledge or Proof of any Man, 170, 171. Preſcription is Perſonal, Cuſtom Local, 171. The Pleading of either muſt be *cujus contrarii Memoria hominum non exiſtit*, 171.

They ought to be grounded on ſome probable Reaſon, 213. for if they be repugnant to natural Juſtice, as tending to make a Man Judge in his own Cauſe, 213. or derogatory from the Freedom of the Subject, as to compel a Freeman to pay Fine for marrying his

his Daughter without a Licence, they are void, 213. But a Cuſtom that the eldeſt Daughter ſhall inherit, is good, 314.

A Cuſtom to deviſe Lands may be alledged in a Manor or Burgh, but not in a bare upland Town; as a Cuſtom concerning Dower, or to make By-Laws concerning the Commons, or Reparations of the Church may, 50, 164.

B.

Such Things as can't be ſeiſed till the Cauſe of Forfeiture appear of Record, and ſuch Things as highly touch the K.'s Prerogative, can't be claimed by Preſcription; others may, 172. as Rents, &c. 216. And Ten'ts in Common may be ſuch by Preſcription, 279.

C.

Unity of Poſſeſſion, of Rent, or Common gain'd by Preſcription, and of the Land out of which they are taken, of an Eſtate equally high and perdurable in both, extinguiſhes them, 172, 415.

D.

There can be no Preſcription againſt a Statute, 169, 173. but Cuſtom may expound a Law, 130. An Affirmative Statute takes not away a Cuſtom, 166, 174. A negative one, which is not declarative, does, 174.

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Debt.

On a Reſervation of Rent, or a Covenant, or Promiſe, or Recogniſance to pay Money at ſeveral Days, an Action lies after each Day; but on a Contract to pay Money at ſeveral Days, Debt lies not till all are paſt, 76, 389. See *Leaſes* A. *Executors* and *Rent.*

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Decies Tantum 472.
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Dedi & conceſſi 400, 488. See *Confirmation* A. and *Warranty.*

Deed. A.

A Deed has ten Requiſites, 53. Is of no Manner of Effect before the Delivery, 72, 73. It may be delivered without Words, 53. but its Operation can't be controlled by a verbal Condition annexed to the Delivery thereof to the Party, 53, 54.

It is neceſſary in every Grant of a Thing incorporeal, 13. not being an original Chattel, 133.

B.

A regular Deed of Feoffment conſiſts of eight formal Parts, 8. yet it may be good without any of them too. If no Place be mentioned, it may be alledged in any Place, 8.

A Feoffee without general Warranty ſhall have all the Deeds. A Feoffee with ſuch Warranty ſhall have thoſe which concern the Poſſeſſion only, 7, 8. A Rem'r Man is bound by the Conditions of the Deed by which he claims, tho' never ſeal'd it, 319.

C.

No Deed ſhall be pleaded by a Privy without ſhewing it, 314, 320, 356. See *Conditions* H.

He, to whom a Remainder is limited upon a Confirmation of the Eſtate of the particular Ten't, cannot bring Waſte without ſhewing the Deed; but after the Remainder is executed, he has no Need to ſhew it, 8. A Deed ſhewn in Court, and not denied, remains there all the Term; but if it be denied, it remains there till the Plea be determined, 320. See *Exception, Grant, Livery* and *Habendum.*

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The Force of a Bond to defend Land to a Feoffee, &c. 488.

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Degrees of Conſanguinity, how computed, 33, 34.

Delivery. See *Deed* A.

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A Demand of Rent to make good a Re-entry muſt be made upon the Land the laſt Day of Payment, a convenient Time before Sun ſet, and at the moſt notorious Place, 284, 285. but a Demand to make good a Diſtreſs for Rent, 215, 216, 286, or an Aſſiſe for the Denial of a Rent-Seek, may be on any Part of the Land, and after the Day, 262, 286.

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By 32 *H.* 8. 1. All Lands in Socage are deviſable, but while Kt.'s Service continued, only two Thirds of ſuch Land to which K. or Subject had Title of Wardſhip, &c. were deviſable, 122, 128, 166, 167. (See *Capite*) without a particular Cuſtom, 166. but a Man was not reſtrain'd by Capite Land ſold before his Death, and by a Feoffment to the Uſe of ſuch Perſon

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A Deviſe prevents the Deſcent to the Heir, and veſts the Freehold without the Executors Conſent, and gives a Right of Entry, 165. which ſhall not be taken away by a Deſcent, 330.

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D.

He that pleads in Diſability muſt not make a full Defence, 192.

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Days in Court are either *Communes*, 205. or *Speciales*, 206. or *Gratiæ*, 206, 207. There are alſo *Dies juridici & non juridici*, 207.

Diſcontinuance.

Diſcontinuance is either of Lands, or of Proceſs, 423. That of Proceſs is not ſaved by Appearance, as Miſcontinuance is, 423. Diſcontinuance of Land is an Alienation, driving thoſe who have Right to an Action, 417. At Law any Perſon ſeis'd of the abſolute Fee in *autre droit*, as Abbots, 423. Biſhops, 437. (Deans being ſole ſeis'd) 442. Husbands, &c. 424 being of full Age, 431. might diſcontinue. If Husband and Wife had join'd in a Leaſe L. the Freehold of the Wife was diſcontinued, and yet the new Reverſion remained in her, 430. but Parſons, Vicars, &c. never could diſcontinue, becauſe they have not the abſolute Fee, 436, 437. yet a Recovery had againſt a Ten't L. without Covin, diſcontinues the Inheritance, 462, and generally any Ten't T. being actually ſeis'd of the Freehold and Inheritance, by Force of the Tail, 436, 442, may diſcontinue his own Eſtate and thoſe depending on it, 424, 425. But if he be not ſo ſeiſed, he

cannot diſcontinue any Way but by a Warrant made to a Tertenant, 425, 426, 436, 442.

B.

By 1 & 13 *El.* No Eccleſiaſtical Perſon can diſcontinue, 65. By 32 *H.* 8. 28. No Husband can diſcontinue a Freehold or Inheritance of his Wife, or any Remainder depending thereon, 424. but he may ſtill bar her by Fine, if ſhe claims not within five Years after his Death, 424. By 11 *H.* 7. 20. If a Woman claiming an Eſtate T. or L. from her Husband, which did not originally come from her ſelf, 467, alien, *&c.* either in ſuch Husband's Life, or after his Death, the next to whom the Lands ſhould belong after her Death ſhall have them, 425.

C.

Of Things lying in Grant, except Reverſions expectant on Leaſes, 428. and Advowſons annex'd to Land, 429. there can be no Diſcontinuance, 428.

D.

No Conveyance whatſoever can work a Diſcontinuance, except a Fine, Recovery or Feoffment, 423. or a Releaſe or Confirmation with Warranty made to a Terten't, 428, 436. A Leaſe L. or Gift T. with Livery, cauſe a Diſcontinuance during ſuch Eſtates, and no longer, 428, 431. Nor can ſuch Leſſee or Donee, by any Act of theirs, make the Diſcontinuance larger, 425. But if the Ten't T. after grant the Reverſion in Fee, and it be executed in the Grantee himſelf, in the Life of the Ten't T. he diſcontinues the Fee, 428, 429. A Grant in Fee by Ten't T. of Things lying in Grant, 428. and even a Releaſe or Confirmation to a Leſſee Y. of Land, and his Heirs, 426, 427. or a Grant of the whole Eſtate to one, and his Heirs with Livery, 427, 441. whether made with or without Warranty, 428, 436, 496. tho' they put the Entail in Abeyance for the preſent, 441. yet they cauſe no Diſcontinuance, becauſe they are void or voidable at the Election of the Iſſue, 427, 436, 496. The Grant of a new Thing by a Ten't T. is meerly void by his Death,

Death, 425. A Warranty annex'd to a Releaſe, &c. never cauſes a Diſcontinuance, unleſs it deſcends to him who has Right, 426, 436.

E.

Where the Reverſion, &c. is not diſcontinued (as where a Donee infeoffs the Donor, having an immediate Reverſion, or the Reverſion is in K.) the particular Eſtate is not diſcontinued, 430.

F.

Where the Eſtate which cauſed the Diſcontinuance is defeated by a Condition, or determined by Limitation, 431. or drown'd by a Surrender, 333. the Diſcontinuance ceaſes. A Diſcontinuance by Matter of Record may be avoided by a Remitter in *Pais*, 457.

Diſparagement 129.

Diſſeiſin.

Diſſeiſin of Land is a wrongful gaining of the *Fee-ſimple* thereof, 15. either to the Wrong-Doer himſelf, or the Perſon by whoſe Command he acts, 266, 267. by entring therein, and the lawful Ten't and his Servants, &c. being departed, 81, 471. claiming the ſame, or taking the Profits, 267, 362, or diſturbing the Ten't from entring, 248. or continuing in Poſſeſſion after a Claim made by him, 342.

The taking of the Profits in ſuch a Caſe againſt the Owner's Conſent, is of it ſelf a Diſſeiſin, tho' the Party claim nothing but at the Will of the Owner, 352. Yet if there be a Term *in Eſſe*, and the Party claim that only, he gains no more, 362, And one Pareener, 331, 479. or Ten't in Common, 283. can't diſſeiſe another without an actual Ouſter.

Diſſeiſin of the Demeſnes of a Manor, is a Diſſeiſin of the Services, with Attornment, 421, 422. but not without it: And it is in a Man's own Choice whether he will look on himſelf as out of Poſſeſſion of a Rent in Groſs by any Act whatever, 422. A Feoffment by a Leſſee Y. is a Diſſeiſin as to the Leſſor, and yet it is a good Feoffment between the Parties, 428, 470.

Foreſtalling the Way to the Land with Threats of bodily Harm, or incloſing it, are Diſſeiſins of any Kind of Rent, 248. Reſcous, Reſiſtance to diſtrain, 246, 247. Suing a Replevin, 248. Counter-pleading the Title, or vouching a Record and failing thereof, 248. are Diſſeiſins of a Rent-Service, or Rent-Charge. Non payment of the Rent demanded on the Day of Payment or after, is a Diſſeiſin of a Rent-Charge or Seck, 232. But not of a Rent-Service, 249. And if the Ten't were ready to pay at the Day, his Non-payment after is no Diſſeiſin of any Rent, without a perſonal Demand, 232, 233.

Diſtreſs.

A.

A Diſtreſs is incident of common Right to every Rent-Service, 135. and every other certain Service, 146. accompanied with Fealty, 148, 230. And to Rent reſerv'd on a Leaſe W. 102, 214. and to a Rent-Service becoming Seck, without any Default of the Party, 232. and to Rent veſted in one by Courſe of Law, 232. or granted for Owelty of Partition, 257. But not to a Rent Charge, without an expreſs Grant, 215.

The Lord diſtreining for Caſtle-guard, 131. or divine Service, 147. ſhall recover Satisfaction in Damages. By Statute, a Leſſor may diſtrain for Rent after his Term is expired, 76.

B.

Things *Feræ Naturæ*, are actually in the Uſe of ſome Man, or ſent to a Tradeſman's Shop to be wrought by him, 74. or fix'd to a Freehold, 75. can't be diſtrain'd for Rent; nor could looſe Shock before 2 *W. & M.* 5, 75. The Utenſils of one's Trade can't be diſtrain'd if other Things can be found, 75. Beaſts that eſcape into the Land wrongfully, may be diſtrained; but if they come in for Want of Fences, they can't be diſtrain'd by a Leſſor without Notice, nor by the Lord of the Fee till they have been Levant, &c. 75.

At

At Law, the Lord could not diſtrain Things remov'd before his View, now he may within 5 Days, 247. And if the Diſtreſs be not replevied within 5 Days after it is taken, he may ſell it, 75.

C.

One may diſtrain for Damage-feaſant in the Night, 214. But in no Caſe unleſs the Beaſt be on the Land, 245.

If the Lord diſtrain on the Highway, or Things not diſtrainable, or where no Rent is due, or the whole tender'd, the Ten't may reſcue the Diſtreſs, 246, 247. before it is impounded, but not after, 76. He that diſtrains living Things, muſt put them in a Pound overt, within 3 Miles in the ſame County, and the Owner muſt ſuſtain them; but he that diſtrains Things without Life, muſt put them in a Pound covert, 76.

Divorce. See *Baron* and *Feme* A.

Donative 438.

Double Plea 316. See *Pleading.*

Dower.

A.

Wherever a free, 44. natural born Subject, 44, not attainted of Felony, &c. 57. is ſeis'd in Deed or Law, 44, 45. ſolely, or in common, 54, 55. more than for an Infant, 44, 45. Of the Freehold and Inheritance, 41, 45, 46. of any certain tenement, 46, not being for the Defence of the Realm, 46, and it is poſſible that he may have Iſſue inheritable by his Wife, 44, 57. being alſo a natural Subject, 46, 49. and a Chriſtian, 46. She has Title of Dower after his natural Death, 50. So long as ſuch Eſtate continues, 54. notwithſtanding the Youth or old Age of either of them, 57. If ſhe be more than 9 Years old at his Death, 44. But ſhe loſes her Title by Elopement, or Divorce *a Vinculo*, 47. alſo ſhe loſt it at Common Law by the Husband's Attainder of Treaſon or Felony, 58. and

by his Attainder of Treaſon at this Day, 44, 50, 55. but if ſhe be a natural-born Subject ſhe ſhall not loſe her Poſſibility of Dower by the Husband's Alienation, 49.

A Wife *de facto* ſhall have Dower, but not an Appeal; (49. See *Certificate*) ſhe who elopes, 47, 49, 50, 57. or whoſe Husband is attainted of Treaſon, ſhall have an Appeal, but not Dower, 50, 58.

Detainment of Charters cannot be pleaded in Bar of Dower brought againſt a Guardian, 56.

B.

Where one dies ſeis'd, and his Wife is endowed, ſhe is immediately from him, 22, 327, 329. and conſequently the Heir's Seiſin, 23, 329. and his Wife's Title of Dower as to ſo much is defeated, 45. A Ten't in Dower continues the Husband's Eſtate, and ſhall be attendant for the 3d Part of the Services of Right due, 329.

C.

Of Dowments there be 5 Kinds, whereof the Firſt is by Common Law, 44. the 2d by Cuſtom, 50. The Firſt gives one Third of the Husband's Lands, &c. 45. the 2d more or leſs, 50. or all, 165. Both require that the Wife be 9 Years old, 44, 48, 49. and where they give leſs than all, that the Dower be aſſign'd her, 46.

Such Aſſignment ought to be out of Tenements, whereof ſhe is dowable, 51, 54. and unconditional, 51. and certain, 51. *viz.* by Meres and Bounds where the Husband was ſole ſeiſed of Land, 47. and by Aſſignment of the 3d Part of the Profits of Things incorporeal, 46. and made by a Freeholder, 51. unleſs the Land were in Ward to a Lord by Kt. Service, 52, 56.

An Aſſignment ſo made, bars all Charges by the Husband after the Title of Dower, 47, 260. An Aſſignment by a Diſs'or, without Covin, binds the Diſſeiſee, unleſs it be prejudicial to him, 52, 458, 459. An Aſſignment by an Heir in Satisfaction of the whole Dower,

Dower may be pleaded by him coming in as Vouchee, 52.

The Value muſt be taken as it is at the Time of the Aſſignment, 46.

Where the Husband dies ſeis'd, and his Wife demands her Dower, and her Demand is rejected, ſhe ſhall, in a Writ of Dower, *unde Nihil habet*, recover Damages from the Death of her Husband, 47.

C.

The 3d Dowment is *ad Oſtium Eccleſiæ*, 50. which is, where one of full Age ſeis'd in Fee, 55. at his Marriage aſſigns certain Tenements to his Wife for her Dower, which he may do without Deed, 50, 51.

The 4th Dowment is *ex Aſſenſu Patris* or *Matris*; and is where one of full Age being ſeiſed of Tenements in Fee, 55, 56. and aſſenting by Deed, the Son, being an Heir perpetually apparent, at his Marriage endows his Wife thereof, 52.

By Force of either of theſe two, the Wife, however young, 55. may enter after her Husband's Death without any other Aſſignment, 55. and ſhall be barr'd of her Dower at Common Law, 54.

The 5th Dowment is *de la plus Beale*, *i. e.* the faireſt of the Socage Land, where the Husband died ſeis'd both of Lands holden by Socage and Kt. Service, 56.

Duke. See *Nobility.*

Dum fuit infra Ætatem 432.

Earl. See *Nobility.*

Eccleſiaſtical Perſons, *Secular*, or *Regular*, 144.

Eccleſiaſtical Court 147, 148. See *Courts*, *Corporation*, *Profeſſion.*

Election.

The firſt Agent ſhall have the Election, 218. He who has two Remedies, may chuſe either, 217. A Grantee of Rent determines his Election to take it

as

as a Rent or Annuity, by counting on a Writ of Annuity, or making a Plaint in Aſſiſe, or avowing for the Rent, 217. But where one may have two Actions for the ſame Thing, he loſes not the higher by bringing one of a lower Nature, 217. An Election made by one Grantee is good for all, 218. Where no Intereſt paſſes, it can't be made after the Death of the Parties, 218.

It may be loſt by the Default of the Party to whom it is given, 143, 219.

The Feoffee of the Iſſue in T. may confirm or avoid a future Leaſe made by the Anceſtor, 70, 71.

Elegit 386.

Embracery 472.

Entry.

A.

Writs of Entry are in the *Per* or *Poſt*, 82, 83, 327. Any Act which would be a Treſpaſs if it amount not to any Entry, is, in Judgment of Law, an Entry, 100, 334. A general Entry into Part, reduces a Freehold in Law to an actual Freehold in all Lands in the ſame County, 23. Alſo in ſuch Caſe, a Claim within View is equivalent to an actual Entry, whether the Party, by whom it is made, have any Fear or not, 342. But an Entry into Part of Land whereof another is ſeis'd, will not deveſt his Eſtate in the reſt, unleſs it be actually made in the Name of all, 340. And where ſeveral Actions are required, or the Land is ſubject to ſeveral Conditions, there muſt be ſeveral actual Entries, 341. See *Continual Claim.*

B.

Where one ſeiſed in Deed or Law, 328. of the Freehold, 327. and Inheritance, 327. of a corporeal Here-

Hereditament, 325. dies by a natural, not civil Death, 201, 336, and the ſame immediately, 330, goes, 328, to an Heir; not a Succeſſor, 338. In Time of Peace, 337, the Entry of the Perſon who has a Right to the Freehold, 337, is taken away, 325. See *Baſtard*.

Yet if no Laches be imputable to the Perſon who has Right, as being under Age at the Time of the Deſcent, 334, or Covert Baron, 335, in Priſon, 335, or out of the Realm, 346, 347, at the Time of the Diſſeiſin and Deſcent, he may enter: If he were perpetually *Non Compos*, 335, 336, his Heir may enter: 356. If one enter into, and die ſeis'd of Lands belonging to a Body Politick in Time of Vacation, the Succeſſor may enter, 350.

Alſo one who has a bare Title of Entry may enter notwithſtanding a Deſcent, 328, 329. And a Recoverer may enter on the Heir of the Recoveree dying ſeis'd before Execution had, 326. So may an elder Brother, *&c.* after the Death of the Younger, who died ſeiſed by Abatement, and claimed as Heir to the ſame Anceſtor, 330, 331. If a defeaſible Inheritance deſcend to one who has a Right of Entry to the ſame Land jointly with another, both may enter, 464, 465.

At this Day one may enter on the Heir of any Diſſeiſor, if the Anceſtor were not quietly ſeiſed 5 Years, but not on the Heir of a Feoffee or of an Abator, or Intruder, dying ſeiſed, without continual Claim, 326, 327, 342.

C.

An Entry for the Time taken away may revive, if the Eſtate which deſcended determine for Want of Iſſue, 327, or be defeated by Remitter, 327, or by a Re-entry for Breach of a Condition, 337. If the Diſſeiſor's Wife be endowed of Part, 329, or the Wrong-doer come to Part by Purchaſe or Deſcent, 330, the Entry is reſtor'd for ſo much.

D.

A Reverſioner may enter to avoid a Deſcent, 338, and even any Stranger may enter of his own Head on a Diſſeiſor, or the Alienee of a particular Ten't having committed a Forfeiture, 334.

Error.

Writ of Error, by what Words releas'd, 385. It lies not of an interlocutory Judgment, 255.

Eſcheat.

Land given to a Body Politick goes back to the Donor when the ſame is diſſolved, 21. Land may eſcheat to the Lord, either for Want of Heirs, or by Attainder. By Attainder of Treaſon, it goes to K. by Attainder of Felony, to the next Lord, 20.

A Defendant ſlain in an Appeal, has been adjudged to be hang'd, that the Lord might have his Writ of Eſcheat, 498. But one hang'd by Martial Law forfeits nothing, 20.

If there be a Ten't by Title when a Diſſeiſee dies without Heir, there can be no Eſcheat, 357. An Avowry for Rent, Acceptance of Fealty from a Diſſeiſor, bars the Lord of his Writ of Eſcheat, and a bare Acceptance of Rent from an Heir or Feoffee does the ſame, 357.

The Lord by Eſcheat, as to ſome Reſpects, is ſaid to come under the Ten't, 450, 451. See *Attornment* B. *Conditions* F.

An Eſcheat takes not away an Entry, 323.

Eſcuage.

He who held by a whole Kt.'s Fee, 113, ought to be with K. 113, or his Lieutenant, or Lieutenant's Deputy, 4, in the War, either in Perſon or by another ſent in his Stead, 114, 40 Days, 113, from the Time the Army entred the foreign Nation, 116.

If the L'd himſelf went to the War; 114, he ſhould have Eſcuage of all his Ten'ts who held by Eſcuage and went not, 117, 118. But not before it was aſſeſs'd by Parliament, 117. Nor of thoſe who held by Cornage, &c. becauſe they held not to go with K. to the

the War, 114. Nor where one Ten't mediate or immediate went to the War, 115.

Whether the Tenant were in the Hoſt the whole Time, was tried by the Marſhal's Certificate, 118.

Eſcuage uncertain was Kt. Service, but Eſcuage certain was but Socage, 117, 118, 135,

Eſtate.

Eſtate and Intereſt are collective, 393, 441.

There can't be two entire Eſtates of *Fee-ſimple* in the ſame Land, at the ſame Time, in different Perſons, 26, 471.

A greater Eſtate may ſupport a leſs, but a leſs cannot ſupport a greater, 98, for a greater Eſtate in one's own or *autre Droit*, always drowns the leſs in one's own Right, 435, 40, 397, except where Land is in the ſame Conveyance given to Two, and the Heirs of one of them, 268, 269. Neither will an intermediate contingent Remainder prevent the Drowning of the particular Eſtate till the Contingency happens, 40.

A Confirmation of the Eſtate of a Leſſee *L.* to hold his Eſtate in Fee, paſſes nothing, 40.

How an Eſtate may encreaſe, 476, 477, for other Matters, ſee *Curteſy*, *Dower*, *Leaſes*, *Fee*, *Purchaſe*.

Eſtoppel.

Eſtoppel may be by Record, and by Matter in Writing, and Matter *in Pais*, 450. It ought to bind both Parties, and extends not to Strangers, 450. That which cauſes it ought to be certain to every Intent, preciſely affirmed, and material, 451, and directly contradictory, *&c.* 77. Matter alledged by Way of ſuppoſal in a Count, is no Eſtoppel after a Nonſuit, 451, 452. An Indenture by which an Intereſt paſſes, works no Eſtoppel, 67, 68, 77.

Where the Truth appears on the ſame Record, it may be alledg'd by the adverſe Party, 452.

Eſtoppel againſt Eſtoppel, puts the Matter at large, 451.

Strangers may take Benefit of Records tending to legitimate or diſable the Party, 452.

An

An Eſtoppel of one as Heir to the Mother, bars not his Claim as Heir to the Father, 467. See *Indenture* and *Acceptance*.

Evidence.

What is good Evidence, 10.

Matter of Juſtification muſt be pleaded, and cannot be given in Evidence on the general Iſſue, 91, 92, 379, 380.

Exchange.

A Conveyance by the word Exchange, 85, implies a Warranty, 261, 483, and if it be executed in the Life of both Parties, 86, paſſes a Freehold without Livery, 85, and being made by an Infant, is not void, but voidable, 87.

A new Rent may be granted, or a Rent *in Eſſe* releaſed, but a Thing merely perſonal can't be releaſed, *&c.* in Exchange for Land, 85, 86. The Things given and taken in Exchange, need not be equal in Value, or have the ſame Quality of Eſtate, but they muſt have the ſame Quantity, 86.

Exception, how it differs from Reſervation, 73, 74.

Excommunication.

If one excommunicate within the Realm, 203, ſue any Action in his own or another's Right, 203, againſt any but him who excommunicated him, 203, and the Excommunication be pleaded againſt him, and teſtified under Seal, *&c.* 203. Of one who has ordinary Juriſdiction, and is immediate Officer of K.'s Courts, 204, the Defendant ſhall have Judgment to go quit without Day, *&c.* 205, but the Writ ſhall not abate.

Execution.

Execution ſhall be awarded without Suit for none but K. 387. It requires not any Delivery of Seiſin by the Sheriff, where the Demand of the Original is certain, 51. Any Execution is diſcharged by a Releaſe of the original Debt, 121, 388, but none, except a *Scire facias*, 387, is barr'd by a Releaſe of Actions, 385.

By

By 38 *H.* 8. 5. Any Ten't by Ex'on being clearly evicted of his whole Eſtate in the whole Land, ſhall have a new Ex'on againſt him, who was Party to the Firſt, but if ſuch Party were a Purchaſer, not unleſs he have other Lands liable to it, 386, 387.

Executors.

Perſons diſabled to ſue in their own Right, 185, 193, 195, 202, not being excommunicate, 204, may ſue as Ex'ors and one profeſs'd may ſue his own Ex'or, 201.

Where two Ex'ors join in an Action, the Nonſuit of one does not nonſuit the other, 222.

Ex'ors ſhall have any perſonal Intereſt given by Statute to the Teſtator, 120, 387. And in ſome ſpecial Caſes, as for Relief, *&c.* may have Debt where the Teſtator cou'd not, 222, 250.

They may releaſe before Probate, 389.

Exemplification 314.

Expoſition.

No Deed ſhall be made void, that by any Conſtruction can be made good, 10; therefore if Land can't paſs in that particular Manner which was deſigned by a Conveyance, if by any Conſtruction it may paſs another Way, it ſhall, 81. Alſo the Words ſhall be tranſpoſed, rather than a Grant ſhall not take Effect, 305. A Warrant not expreſly limited to any Perſon, goes by Implication to the Feoffee, 481. Bad Grammar vitiates not a Deed, 223.

A Statute ſhall never be ſo conſtrued as to damage a Man wholly innocent, 460. Neither ſhall the general Words of a Grant be ſo conſtrued as to work a Wrong, 62. In joint Grants, the Law will conſtrue one to precede to avoid a Wrong; and if the whole can't lawfully paſs from both Grantors, ſo much ſhall paſs from each as may lawfully paſs, 401.

No Grant ſhall enure againſt the expreſs Purport thereof, 414, 415. *Quoties in Verbis nulla ambiguitas eſt, ibi nulla Expoſitio contra Verba expreſſa fienda eſt*, 223.

Quæ Dubitationis Cauſa tollendæ inſeruntur non ledunt communem Legem, 289, & *Expreſſio eorum quæ tacite inſunt nihil operatur*, 277.

A Grant of Rent *de qualibet Acra*, enures out of every Acre, 224. See *Jointenants*.

A Disjunctive in the latter End of a Sentence disjoins the Whole, 313, for other Matters, ſee *Proviſo*, *Grants*, *Agreement*.

Extinguiſhment.

Rent and Common, &c. are but ſuſpended, not extinguiſhed by Unity of Poſſeſſion of the Land charged therewith, if the Eſtate in both be not equally high and perdurable, 172, 173, 415.

A Grant of Rent to the Ten't of the Land, enures by Way of Extinguiſhment, 408.

Extortion 47, 472.

Falſifying a Recovery, &c.

At Law a Leſſee Y. could not falſify a Recovery againſt a Freeholder, but now he may, 70. Yet a very Ten't cannot falſify a Recovery againſt his Lord; 160, and no one can falſify a Point tried by Jury, 461.

F.

Fealty.

Fealty is an Oath to be true to the Lord, and to perform all the Services due, which muſt be done in proper Perſon, 112, 113, by every one who hold of another, either at Common Law, 143, 144, 148. or by Copy, 109, not merely at Will, 102, or in *Frankalmoin*, 146, notwithſtanding all other Services be extinct, 149, 145, 151, and it is a Seiſin of all Services, 113.

Fee.

A.

Fee ſometimes ſignifies an Eſtate to a Man and his Heirs, ſometimes Land, as holden of another. 1. Fee as

as taken in the firſt Senſe, is either Simple or in Tail, neither of which can paſs in a Grant or Feoffment without the word Heirs; 15, 28, 29, which includes all near or remote, born or to be born, 13, for a Gift to *A.* or his Heirs, or to *A.* and his Heir, 12, or to *A.* and his Iſſue, 29, or Children, 13, gives him but an Eſtate L. Yet the word Heirs is not neceſſary in Deviſes, 14. Fines, Recoveries, 14, and ſome other ſpecial Conveyances for particular Reaſons, 13, 14. Alſo it may be ſupplied by Reference, as by the Clauſe, *in Forma prædicta, &c.* 15, 29.

Every Fee-ſimple and Tail have ſome eſſential Properties, which cannot be reſtrain'd by any Condition, as that the Ten't ſhall be diſpuniſhable for Waſte, the Wife, ſhall have Title to Dower, the Husband to be Ten't by Curteſy, 313.

No ſuch Eſtate can be movable but by Cuſtom or particular Agreement upon a Partition, 6.

B.

Fee-ſimple is either abſolute or qualified by Condition or Limitation, 2, 39. Each of theſe is larger than any other Eſtate, and will not admit the Limitation of any Remainder after them, 26, and may be charged with a Rent in Fee one Way, or other, whether they be movable or immovable, 434.

Anciently no Man could alien Land deſcended to him, unleſs to reward his Servant, or in *Frankalmoin* or Frank-Marriage, 145. But at this Day regularly, every Ten't in Fee-ſimple may, at his Pleaſure, alien the ſame, 311, and cannot be wholly deprived of ſuch Power by any Condition, yet he may be reſtrain'd from Alienations tortious, or to particular Perſons, 112.

Fee-tail, which is an Inheritance reſtrain'd to the Heirs of the Bodies of ſome particular Perſons, 28, 31, 38, and was made a particular Eſtate by *W.* 2. is ſtill deſcendible as it was before, but after that Statute it could not be alien'd, charg'd or forfeited, as it might

might have been before by the Donee, having Iſſue inheritable alive, 27.

Whatever concerns Land may be intail'd within *W.* 2. 28. but no Perſon is enabled by that Statute to take an Eſtate who was diſabled at Law, 175.

D.

Tail is either General or Special; 28, the firſt is where Lands are given to one and the Heirs of his Body, 28, or to two Men, or to a Man and his Mother, 267, or to 2 Men and one Woman, 36, 267, and the Heirs of their Bodies. A Gift to an eldeſt Son, and the Heirs of the Body of his Father gives him an Entail. A Gift to him and his Heirs of the Body of his Father, gives him a Fee, 37.

Special Tail is where Land is given to one and his Heirs by ſuch a particular Perſon, which is good, tho' both of them be married to different Perſons at the ſame Time. By a Gift to Husband and Wife, if there be a Limitation equal to the Heirs of both their Bodies, both take a ſpecial Tail, if to the Heirs of the only begotten of or by the other, the Party to whom it was ſo limited only takes it.

Some Gifts in T. as thoſe in T. Male out of the Letter, are in the Equity of *W.* 2. Whoever inherits by Force of ſuch a Gift, muſt convey his Deſcent wholly by Heirs Males, 35, *&c.* A Gift to one and his Heirs Males by K. is void, in a common Grant gives a Fee, in a Will an Entail, 38.

E.

A Writ of Error by the Iſſue in T. can't be barr'd by a Releaſe of the Anceſtor, 28. Alſo an Eſtate T. originally given by ſome King, can't be barr'd by any Act whatſoever done or ſuffered by the Ten't, while the Reverſion or Remainder continue in the Crown, 477. But any other Eſtate T. may be barr'd by lineal Warranty and Aſſets, 313, 480, or forfeited by Attainder of High Treaſon, 477, 593, and not only the Entail, but alſo the Remainder and Reverſion thereon

thereon depending may be barr'd by a common Recovery, 462, 477, notwithſtanding any Condition to the contrary, 313. Yet if a lineal Warranty and Aſſets deſcend to the Iſſue, and he alien the Aſſets and die without bringing a *Formedon*, his Iſſue ſhall not be barr'd, 501. See *Attainder*.

Alſo an Entail may be barr'd by a Fine, 477, and it may be charged with a Rent granted by the Ten't in Conſideration of a Releaſe of Right, and if an Entail be cut off, any Grant made by the Ten't before, becomes indefeaſible, 392, 438. See *Leaſes* A.

Ten't T. may be reſtrain'd by Condition from making a Leaſe by Force of the Statute, 312, and may be impower'd by a Condition to alien, 313.

If Ten't T. within Age make a Feoffment, and be attainted, and die, his Iſſue is put to a *Formedon*, 733.

A Ten't T. can't have ſome Writs, which Ten't in Fee may have, 424, 425.

E.

Where Land is given in ſpecial T. and after it becomes impoſſible by the Act of God, that there ſhould ever be any inheritable Iſſue, the Donee is called Ten't T. *apres*, &c. and has 8 Qualities ſuperior to thoſe of a bare Ten't L. but has no larger Eſtate, 39.

Felony, Force of the Word, 499.

Such Felony as is puniſhable by Death, corrupts the Blood, and forfeits Land in Fee, at this Day bars not Dower, 500, is implied in a Statute by the Words, *ſubeat judicium vitæ & Membrorum*, but not by the Words that the Offender ſhall be ſubject to K.'s Will, Body, Lands and Goods, 500. It diſables one to purchaſe to his own Uſe, 2, 62. Pardon thereof extends not to High Treaſon nor Piracy, 493.

Feoffment, *Feoffor* and *Feoffee*.

Thoſe who are diſabled to purchaſe, are diſabled to feoff, *non e converſo*, 62.

A lawful Feoffment deveſts all wrongful Eſtates, 13.
A Feoffment by a Leſſee Y. is a Diſſeiſin as to the Leſſor, and yet is a good Feoffment between the Parties, 427, 470.
The Feoffor is Ten't to the L'd's Avowry till all the Arrears of Rent be paid, but the Feoffee is very Ten't, 112, 359.
The Feoffor is Ten't to the L'd's Avowry till all the Arrears of Rent be paid, but the Feoffee is very Ten't, 112. See *Avowry*.
For a Deed of Feoffment. See *Deed* B.

Fictions.

Fictions in Law always equitable, 224. See *Agreement*.

Fine.

A Fine with Proclamations bars all Strangers under no Diſability, not claiming within 5 Years, 349, 414, 476.
For Fines by Feme Coverts and Ten't T. See *Fe*, E. and *Baron* and *Feme* D.
Fine and *Ranſom*, 191.
Forcible Entry, 343, 344.
Foreign Voucher, 156.
Things done in foreign Countries, how pleadable and triable, 347, 348, 349.
Forejudgment, 153, 154.

Forfeiture.

Any Eſtate in a Thing lying in Livery, 339, in Poſſeſſion or Remainder, 339, being leſs than an Inheritance, 40, 340, may be forfeited by Feoffment, deveſting the Reverſion or Remainder, 339, 426, but not by a Leaſe and Releaſe or Confirmation, *&c.* 426. *Quære*, If a Leaſe by a Leſſee L. to the Leſſor for the Leſſee's Life, with a Remainder over to the Leſſor, and a Stranger be any Forfeiture, 430.

Such Eſtates in Things lying in Livery or Grant may be forfeited by Matter of Record 3 Ways. 1. By Alienation, whether it deveſt the Reverſion or Remainder, or not, 39. 2. By Claim in a Court of Record (expreſs or implied) of a greater Eſtate than the Party has a Right to, 339. 3. By affirming either actively or paſſively, the Reverſion or Remainder to be in a Stranger, 51, or being of Covin to Recovery, without the Aſſent of him in Reverſion or Remainder, appearing judicially of Record, 4, 5, 462.

He who enters for a Forfeiture comes under, and is ſubject to the Charges of the particular Ten't, 228, 435.

A Forfeiture is not purged by a Re-entry for a Condition broken, 287, 288, 340. A Forfeiture generally given by Statute for a private Wrong, goes to the Party wronged, 245, 246. See *Eſcheat*, *Indictment*, and *Office*.

Formedon. See *Aſſets* and *Fee* E.

Frankalmoin.

Every Ten't in *Frankalmoin* muſt be ſpiritual Coporation, 144, 146, and hold of the Donor or his Heirs, 49. Conſequently ſuch a Tenure can't be reſerved by a Subject, ſince the Statute of *quia Emptores*, without a Diſpenſation thereof, 150. And if a Seigniory *Frankalmoin* Eſchear, *&c.* the Ten't ſhall hold of the next Lord by Fealty, 151.

Before the Statute had altered the Manner of celebrating divine Service, 146. Such Ten'ts were compellable by the ſpiritual Law, upon a Complaint to the Ordinary or Viſitor, to ſay Prayers for the Souls of the Founders, *&c.* 146, 147. And in Reſpect thereof are diſcharged of all other Services whatever, 146, 148, and may compel the Lord to acquit them againſt all other Lords, 152.

They cannot be diſtrain'd for a Neglect of their Duty, becauſe nothing certain was reſerved in the Creation of the Tenure; but thoſe, who hold by any divine Service ſpecially expreſs'd, may be deſtrained and

and compelled to pay Damages for their Neglect, 147, 148.

Frank Bank, 165.

Frank Marriage, 3, 30, 31, 263.

Fraudulent Conveyances, 5.

Statute of Frauds, 77, 78.

Freehold.

A Freehold in Land is the Eſtate which makes a Man Ten't to the *Præcipe*, 356, and muſt be an Eſtate L. at leaſt, 61. It cannot paſs without Livery, except in ſome ſpecial Caſes, 85, 105, 304, yet both a Freehold in Law, and alſo in Deed, may in ſome Caſes be veſted in a Man without Entry, 356, 362.

A Freehold in Law gives Title of Dower, 44, (See *Curteſy*) and deſcending to an Heir, takes away an Entry, 327, 328. See *Voucher.*

An Eſtate of Freehold in Rent cannot be created out of a Term Y. 224.

Gavelkind.

Gavelkind makes all the Sons equally inheritable by the Cuſtom of the Fee, 262. Both Gavelkind and Burgh *Engliſh* differ from the Common Law as to the Titles of Dower and Curteſy, 42, 50, 165, and differ from all other Cuſtoms, in being taken Notice of by the Law when generally alledged, 263.

Glebe, How charged, 437, 438. See *Parſon.*

Grant.

The word Grant is general, and may be conſtrued to amount to any particular Conveyance; *non e Converſo*, 400. In a Leaſe Y. it implies a Warrant, 488.

The ſame Deed may enure partly by Way of Grant, partly by Extinguiſhment, 408. A Rent granted to Parceners for Owelty of Partition, ſhall deſcend in Courſe of Parcenary, 256. A general Grant of Rent by two Ten'ts in Common, ſhall enure ſeverally, 280, 256, 357. See *Expoſition, Deed, Feoffment, Surrender*, and *Confirmation.*

Guardian.

Guardian by Common Law, is either by Nature, Tenure, or for Nurture, 139, 140.

1. The Father's Right by Nature to the Guardianſhip of his Son or Daughter, being Heir apparent, is preferr'd to the Title of the Lord by Kt. Service, as to the Marriage, but not as to the Cuſtody of the Land, 132, 139.

B.

Guardianſhip by Tenure is either by Kt. Service or Socage. The Lord by Kt. Service had the Marriage and Wardſhip of the Land of an Heir Male, till his Age of 21 Years, 120. of an Heir Female till her Age of 14, and by *W.* 1. if ſhe were unmarried at her Anceſtor's Death, till her Age of 16, to tender her Marriage within that Time, 120.

He could marry his Ward but once, 128. and forfeited all his Right by diſparaging an Heir Male under the Age of 14, 129. Had the ſingle Value of the Marriage by Common Law, without any Tender; and by Statute, the double Value of an Heir Male refuſing his Tender, and marrying againſt his Will, 130. For either of which he might ſue, or detain the Land, and he held the Land detain'd for the ſingle Value as a Pledge; for the double Value as a Satisfaction, 61, 130. See *Ward.*

C.

The next of Blood, 135, 136. being of full Age, and *Compos, &c.* 138. and not poſſibly inheritable to the Heir of Socage Land, 135, 136, 138, 139. ſhall be his Guardian till his Age of 14. 135, 136, 141. Of Brothers being Uncles to an Heir of Land in T. the Elder is prefer'd; of the Couſins of the Part of the Father or Mother, he who firſt ſeiſes the Heir, 138.

The Father, 139. and every other Socage Guardian, 136. or whoever occupies the Land as ſuch, 141, ſhall account to the Heir at his Age of 14. 136, 140. and be allowed his Expences, 136. and for what he

was robb'd of, &c. 140. But after the Heir's Age of 14, he ſhall be charged but as Bailiff, 141. and ſhall not account for a Marriage after that Age, 137.

Guardianſhip in Socage can't be forfeited by Attainder, and goes not to the Husband or Executors of the Guardian, 139, 140. as a Guardianſhip by Kt. Service did, 141.

D.

If an Heir have no Inheritance lying in Tenure, and the Father diſpoſe not of his Cuſtody, the next of Kin ought to have it according to the Rules aboveſaid, 137.

By Statute, any Father may diſpoſe of the Tuition of a Minor to any one, not being a Popiſh Recuſant, 134, 139.

Habendum 8.

The *Habendum* may enlarge the Premiſſes, 396. It may alſo ſever a joint Eſtate therein given, 269, 276. And by expreſs Words may reſtrain a Fee-ſimple therein to a Fee-tail, 29.

Regularly, none can take a preſent Eſtate who are not nam'd before the *Habendum*, 10, 29, 37, 38.

Heir.

A.

An Heir muſt be a natural lawful Subject, 11, having humane Shape, 10. born either in Wedlock, or within 9 Months after his Father's Death, 11, 12, 185. Yet he may be an Outlaw in Debt, 12. attainted of Hereſy or *Præmunire*, 12, 500. and Ideot, Leper, &c. 12.

One Anceſtor can't take from another the Power of binding one who is a common Heir to both, 20.

B.

Whatever is grantable by the Great Seal, is deſcendible by the Rules of Common Law, (13) No Limitation can alter the Courſe of Deſcent, 12. therefore if a Fee be limited to the Heirs Male, 38. or elde

Heir

Heirs Female, 39. or Heirs of the Part of the Mother, 19. yet it ſhall deſcend by the common Rules of Law: But Arms deſcend to the Heirs Male only, 28.

Every Heir to Land in Fee-ſimple, 16, 21. or to a Warranty, or to ſue an Appeal, 21. muſt be of the Whole, 16, 21. and alſo of the moſt worthy Blood, 18, 21.

He that is next of Kin *Jure Repræſentationis* takes as Heir, the next *Jure Propinquitatis* takes by Purchaſe, 16. Not the Father, but the Uncle ſhall be Heir to the Son; but if the Father have a Son born after, he ſhall enter on the Uncle, 16, 17. and if the Uncle get an actual Seiſin, the Father may afterwards be Heir to him, 17. But the Father can never be Heir to a Warranty made to or by the Son, 17.

C.

All thoſe of the Blood of the Father, ſhall firſt be Heirs to a Purchaſer, and then thoſe of the Blood of the Mother, 18. But Land, or an Uſe, &c. deſcended to one as Heir to his Father or Mother, ſhall rather eſcheat than go to any, not of the Blood of the firſt Purchaſer, 18, 19, 20. Unleſs the Heir made himſelf a Purchaſer by taking a new Eſtate in ſuch Land, &c. 18, 19.

D.

He that claims a Fee-ſimple as Heir, muſt be Heir to him that was laſt actually ſeiſed, 17, 22. Conſequently, if an elder Brother get actual Seiſin of an Uſe, Land, Rent, Advowſon, &c. in Fee ſimple, &c. deſcended to him from the Father, and died, the Siſter of the whole Blood ſhall have them as Heir to him; if he get not ſuch Seiſin, the younger Brother of the Half Blood ſhall have them as Heir to the Father, 22, 23. But Eſtates T. and Dignities, deſcend always to the Heir of the firſt Donees; and Crown Lands *Jure Coronæ* attend the Crown, 24.

E.

No Bond, Leaſe Y. or other Chattel, 12, 494. except Heir-looms by Cuſtom, 27. can go to a Subject's, 12. Heir, tho' they be ſo limited, 71, 448. But Fiſh in a Pond, *&c.* go to the Heir, 12. Alſo an Action againſt one who defaces a Monument may be brought by an Heir, 27. And a Warranty, Annuity, or Freehold determinable upon Lives, 494. or an Inheritance in an upper Chamber, 81. may deſcend to an Heir, But nothing can deſcend to an Heir, except it were firſt in the Anceſtor, whether it be Land or Rent, 151, 301. or a Warranty, or Lien to pay Money, 490. except a Title of Re-entry, 301. yet in ſome ſpecial Caſes, the Heir may have an Action which the Anceſtor could not have, 94, 336, 337.

In Debt againſt an Heir, the Land is bound from the Time of the Writ, 157. For other Matters, ſee *Fee*, *Purchaſe*, *Lien*, *Voucher*.

Herbage 6.

Hereditament 2, 7.

Hide or *Plowland* 7, 113, 114.

Homage.

Homage was due from the very Ten't, 112. whether he came in as Heir, or Alience, 160. But from no other, 112. and from him but once, 160.

None could do or receive it by another, 110, 113. nor could one do or receive it in his own Perſon, unleſs he had a Fee ſimple or Tail in his own or another's Right, 110. An Eccleſiaſtick, or Feme doing it, ſhould not ſwear to become the Lord's Man or Woman, 109. as all others did, 109. See *Corporation*.

Homage Auncestrel.

Homage Auncestrel, by which any Lay Ten't, 158. may hold of a Temporal or Spiritual Lord, 154, 158. bound the L'd to warrant, 155. and acquit the Ten't, 152, 155. while it laſted; but if it were once diſcontinued by a total Alienation of the Tenancy, it could never be revived, 159.

Hoſpita-

Hospital 437, 442.
Hotchpot 263, 264.

House.

House for Man's Habitation is favoured in Law, 5, 97.

Husband. See *Baron* and *Feme.*

Identity.

The Construction of the Word *Idem*, 29, 234.

Ideot.

Ideots, *Non Compos*, &c. may be Heirs, 12. may prosecute an Action by others, 208. and be barr'd of an Entry by a Descent, 336. and be concluded by a Purchase or Feoffment made by them, 3, 336. yet K. on Office found, may avoid their Acts, &c 336. and so may their own Heirs after their Death, 3, 336.

Imprisonment.

Old Men, and Women with Child, have been excus'd from Imprisonment, in Cases wherein others are liable to it, 385, 386. One may avoid a Bond by Duress of Imprisonment, 341. Also one in Prison may avoid a Descent, 345. or Outlawry, or Default in a real Action, 346. had against him during his Imprisonment; yet upon Motion he may be brought to the Bar, and put to answer, &c. 346.

Indenture.

An Indenture is either in the first or third Person, 319. All the Parts thereof are but one Deed in Law; 319. It estops a Lessee to plead that the Lessor had nothing in the Land, 77. But where an Interest passes by it, it works no Estoppel, 68, 77. nor does it estop in any Case after the Lease is determined, 77, 78.

Indictment.

The different Relation of a Forfeiture on an Indictment, and an Appeal, 20, 21, 498.

Infant.

An Infant may sue by Guardian or Prochein Amy, and defend by Guardian, 208. But in many Cases the

Parol ſhall demur if he be Demandant, and he ſhall have his Age if he be Ten't, 251. and where he is Plaintiff the Defendant ſhall not wage his Law, 391.

He cannot alien Lands or Goods, 258. or make an unavoidable Purchaſe, 3. or bind himſelf in any Penalty whatever, 258. He can't wage Law, 391. nor take any other Oath, 259. except that of Allegiance, 109. and is not hurt by a Default in a *Præcipe*, 259. neither can he be bar'd of a Right of Action, 485. A Warranty made by him is void, 471. A Feoffment, 471. Exchange, 86. or Leaſe Y. 68, 408. is voidable. He or his Heir general, or ſpecial, 433. may at any Time avoid Matters *in Pais* done by him during his Nonage, 3, 432. But Matters of Record, ſuffered by him in Perſon, can be avoided during his Nonage only, 199, 486. and in ſome Caſes, not at all, 486. He is bound by all Conditions, 321, 322. Charges and Penalties, 486. in the original Conveyance, 321, 486. except that of doubling the Rent for Non-payment, 335. See *Conditions* M. He may loſe his Preſentment by Lapſe; his Right by Non claim in ſome Caſes; his Entry by a Remitter, or by a Deſcent to K. but by no other Deſcent, 335. Being Executor, he may Releaſe upon Payment, but not without, 258. In many Caſes, an Infant born is more favoured than one *in Ventre ſa Mere*, 154, 334. See 498.

Inheritance. See *Heir* B, E.

Inheritance may ſignify Land purchaſed, 24.

Intendment.

The Judges ought to follow the Intendment of the Law, 120.

Intereſſe Termini.

A bare *Intereſſe Termini* can't be confirmed, 392. Neither can it be enlarged, 361. Nor ſurrender'd in Deed, 433. Yet it is grantable over, and ſhall go to Ex'or, 71. and is not loſt by the Death of the Leſſor, 87.

Joinder in Action 262. See *Jointenants* D.

Jointenants, and Tenants in Common.

Jointenants by Right are thoſe who taking in their natural

natural Capacity by joint Words, have an undivided Poſſeſſion and Eſtate, which yet may have ſeveral Limitations, 265. Jointen'ts by Wrong are thoſe who diſſeiſe another to their own Uſe, *&c.* 266, 274.

Ten'ts in Common are thoſe who have an undivided Poſſeſſion but ſeveral Eſtates, 275. as where a Jointen't aliens his Part, 275. or a Jointen't in Fee makes a Leaſe L. 276, 277, 278. or a Jointen't Y. makes a Leaſe Y. 277. or a joint Leſſee L. grants all that belongs to him to another, 276. or a ſole Ten't enfeoffs another of an undivided Part, 276. or grants Land jointly to Perſons who take in ſeveral Capacities, 275. or to *A.* to hold for Life, to *B.* for Years, 273. or one Moiety to *A.* another to *B.* 275. or by Conveyance veſting at ſeveral Times, as by Way of Remainder to the Heirs of *A.* and *B.* then living, 274. See *Grants.*

A Grant to two Men, *&c.* and the Heirs of their 2 Bodies, gives them a joint Eſtate for their Lives, and ſeveral Inheritances, 267, 268. A Leaſe to *A.* and *B.* and the Heirs of *A.* gives a joint Eſtate for Life to both, and the Fee to *A.* 269. which is executed as to ſome Purpoſes, and not as to others, 270, 377.

A Right of Entry and of Action may ſtand in Jointure, but a Rent ſuſpended, and a Rent in Poſſeſſion cannot, 273, 274. Alſo a Man may be poſſeſs'd jointly, 267. or in Common, 282. of Chattels, or Things in Actions, 361. And a joint Stock between any but Merchants ſhall go to the Survivor, 267.

When a temporary Cauſe, which ſevered a Jointure, is determined, the Jointure revives, 274, 276, 277.

B.

Jointen'ts are ſeiſed, *per my & per Tout*, 271. and a Rent reſerved to one of them in a Leaſe by all, ſhall enure to them all, unleſs it be by Indenture, 277, 300, 301. And an Act done to or by one Jointenant, or joint Grantee, in many Caſes is effectual for them all, 83, 84, 112, 320, 419. yet if they agree ſeverally to preſent to a Church, the Ordinary may accept or refuſe the Preſentment of either of them, 272. But

if Parceners can't agree, he muſt accept the Preſentee of the Eldeſt, or of her Iſſue or Aſſignee, 254. 331. They ſhall do Homage jointly, but the eldeſt Parcener ſhall do it for all the reſt to a Subject, and (if they be within Age) to K. alſo, 111, 112.

C.

Each Jointenant has a Right to diſpoſe of no more than his own Part, 432. and if he die without diſpoſing of it, his Part ſhall go to the Survivor, who ſhall avoid any Deviſe, 271. Incumbrance, 270. or Eſtoppel, 270. but not an Intereſt for Years in the Land it ſelf, actually veſted in another, 270.

D.

In real and mix'd Actions, Jointenants, 279. and in many Caſes Parceners ſhall join, 252, 280. But Ten'ts in Common ſhall ſever in ſuch Actions, 279. but ſhall join in an Aſſiſe for a Thing entire, reſerv'd for Rent, 279. 280. and in *Quare Impedit*, Raviſhment of Ward, Detinue of Charters, &c. yet one of them can't bar the other by Releaſe, &c. 280. Alſo they ſhall join in all perſonal Actions which concern not the Title, but the Profits, 281, And in Debt againſt their Leſſee, but ſhall ſever in Avowry, 281, 282. Where Jointenants or Parceners have a joint Remedy, and one recovers, both may enter, 274, 464. In an Action of Waſte in the Tenuit, one Jointenant by his Releaſe may bar the other, but not in an Action of Waſte in the Tenet, 456.

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C.

C.

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2 *E.* 6. 8. Saves the Subject from being concluded, and gives a Traverſe in many Caſes where there was none at Law, 126.

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In what Caſes Proceſs of Outlawry lies, 194.

Parceners.

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B.

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C.

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Bars require a common Certainty, Pleas in Abatement, or after a latter Continuance, Counts, Replications and Indictments, a greater Certainty, Estoppels, the greatest, 402, 403; And all Pleas shall be construed most strongly against him that pleads them, 404, yet all necessary Circumstances shall be implied, 404; And the Omission of a Circumstance may be saved by other's Plea, 404, 405: Also Matters of Inducement, and Sentences in the Ecclesiastical Courts may be alledged generally, 403, 404. Also a Seisin in Fee may be alledged generally, but regularly the Commencement of particular Estates must be shewn, 404; And by Force of the antient Forms, *cum* J. S. *seisitus demisit*, is good in Counts, but not in other Pleadings, 403.

Of Things lying in manual Occupation, a Man shall plead that he was seis'd *in Dominico suo ut de feodo*, 25; In Pleading of a Grant of Freehold, you conclude *Virtute cujus fuit inde seisitus*, in Pleading a Lease Y. of Land, *Virtute cujus intravit*, &c. 284.

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A Monk's Marriage was void, a ſecular Prieſt's voidable, 208.

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Every

Every Purchaſer muſt take either in a natural or politick Capacity, 3; Aliens, Infidels, Perſons attainted, and Corporations, can purchaſe only for the Benefit of others, 2, but all others being neither Monſters, nor profeſs'd, may purchaſe for their own Uſe, 4; Yet their Purchaſes are voidable, if they be under Age, *Covert Baron*, *Non Compos*, *&c.* 3, 62.

Wife or eldeſt Son of B. Earl of *P. &c.* are good Names of Purchaſe, tho' the Chriſtian Name be miſtaken, 4; Alſo Heir, 4, or Heir Female, 35, or Heir Male of *B.* 37, are good Names of Purchaſe; yet no one can take an entire Fee, 38, 251, by the word Heir, as a Purchaſer, who is not abſolutely and compleatly Heir, 16, 38, 251, nor can any Heir take as a Purchaſer by ſuch Name, by Force of a Limitation made by his own Anceſtor, 31, 32, or by the ſame Conveyance, by which the Anceſtor took an Eſtate for Life, 32, 20, 482.

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Records. See *Courts.*

Recovery.

The Recoverers in a Common Recovery could not diſtrain, nor have Waſte, or Debt before Attornment, till they were impowered by Statute, 160, 161; The Judgment to recover in Value, binds the Right of the Entail before Execution ſued, 461, 462. See *Falſifying Recoveries.*

Redisſeiſin 234, 235.

Relation 306. See *Fiction* and *Agreement.*

Releaſes.

A.

Releaſes are either of a Right to Land or of Actions, &c. and are either expreſs or implied, 350, 351; An expreſs Releaſe is where one by Deed having in it the words Releaſe, Quit-Claim, or Grant to hold the Land diſcharged of Rent, or ſuch like, expreſly gives up his Right, 350, 351; An implied Releaſe, which is conſtrued more favourably than an expreſs one, 351, is where a Man does an Act, which in Judgment of Law amounts to a Releaſe, as where a Lord, 43, 351, or one who has antient Right, diſſeiſes the Ten't, and makes a Feoffment, 351, or where a Ten't by Curteſy initiate, 43, or Feoffor, &c. who has a Power

Power of Revocation, makes a Feoffment, 325, or where an Obligee makes the Obligor his Ex'or, or becomes his Ex'or or Wife, 351.

B.

A Releaſe of a bare Authority given to a Stranger is void, 325, 352; So alſo is a Releaſe of a bare Poſſibility, as where a Son in the Father's Life releaſes all his Right to the Father's Diſſeiſor without Warranty, or a Conuſee before Execution, releaſes all his Right in the Land to the Conuſor, 353; or a Plaintiff in the *King's Bench*, releaſes all Demands to the Bail, 353; yet a Feoffment made by the Son of the Father's Land, will bar him after the Father's Death, but not his Iſſue after his own Death, 352; Alſo a Right to a Reverſion may be preſently releaſed, 352.

Releaſes of Right to Land, either enure by Way of *Mitter le Droit*, or of enlarging an Eſtate, or of *Mitter l'Eſtate*, or of Extinguiſhment, 367.

C.

A Releaſe of the firſt Sort may be made for Part of the Land, but not for Part of the Releaſor's Eſtate, 366; If it releaſe a Right to a Freehold it muſt be made to one who has ſuch Eſtate in Deed or Law, in Poſſeſſion, Reverſion or Remainder, actually veſted in him, 353, but if it releaſe a Right to a Chattel only, it may be made to one poſſeſs'd for Years, 351; Alſo a Releaſe from a Demandant, (but from no other Perſon,) 381, to a Vouchee, or Ten't to a *Præcipe* having alien'd, is good, 353, 381; Alſo a Releaſe of a Right to Dower, may be made to a Guardian in Chivalry, 354; And a Releaſe of an Annuity, to the Patron in Vacation, 353.

D.

A Releaſe by a Lord, 357, or by a Donor or Leſſor, 358, to his Ten't being diſſeis'd, diſcharges the Seigniory, &c. A Releaſe by a Lord to his Ten't having

having made a Feoffment, discharges the Arrears; 360. A Release by a Donor to the Donee having discontinued, discharges the Rent, 357. But the Release of the Grantee of a Rent-Charge to the Grantor being disseis'd, is void, 357, 358.

E.

Of Releases by one whose Entry is lawful, some enure by Way of *Mitter le Droit* only, which transfer the whole Right of the Releasee to the Releasor exclusively of all others, as much as if the Releasor had entered, and made a Feoffment or Grant to him, 367. and make his wrongful Estate become rightful, 366. and amount as it were to a new Purchase, 372. A Release enures in this Manner, which is made to one Disseisor by a sole Ten't in Fee, 368. or K.'s Ten't L. 368. being disseised by Two, and joining with the Lessor in a Release to one of them, 368. or by the Lessee of two Jointen'ts being disseised by both his Lessors, and releasing to one of them, 368.

But inasmuch as the Possession is not actually remov'd, no Release shall enure to destroy a Warranty, or Confirmation or Grant of Estovers, *&c.* made to the Releasee himself, or those from whom he claims, 372. or a Condition expresly contain'd in the Deed by which he was infeoff'd, 371, 372. or a Grant of Rent, or a Feoffment, Lease, or Release made by himself, or an Endowment of his Son's Wife by his Assent, 372.

A Release by one whose Entry is lawful enures partly by Way of *Mitter le Droit*, and partly by Way of Extinguishment, when the Releasee has his Estate by Title; as Feoffment, 279, 366. Gift, Lease, or Marriage, 369. or by Usurpation, 279. or hath made a particular Estate before, 365. or where the Releasor hath Right but to a particular Estate, 363. or to a Moiety, 369. or has only a Title of Re-entry by force of a Condition, 369.

A Release by Ten't L. being disseis'd, made to a Freeholder, bars all Actions during his Life. But a Release by a Lessee Y. being ousted, made to the Dis-

ſeiſor, bars neither the Entry nor Action of the Leſſor, 368.

A Releaſe by one, who has a Right of Entry to the whole Eſtate, defeats all *meſne* Titles, 370.

F.

Ten't L. taking a Releaſe from a Diſſeiſee ſhall have Advantage of it during his Life, 373, yet the whole Right paſſes not to him, 373, for after his Death, the Releaſe ſhall aid him in Reverſion or Remainder, *&c.* 356, if he can ſhew it, 356: Whoſoever had the Remainder at the Time, whether the Releaſor's Wife, or any other, except the Releaſor himſelf, 395. Alſo a Releaſe to one joint Treſpaſſor may be pleaded by another; and a Releaſe to the Heir may be pleaded by the Ex'or, 320, and generally where a Releaſe diſcharges the Ground of the Plaintiff's Action, it may be pleaded by a third Perſon, 360; But a Releaſe of Actions real can be pleaded only by or againſt ſuch Perſon to, or by whom it was made, 383.

G.

Releaſes by one whoſe Entry is not lawful enure alſo partly by Way of *Mitter le Droit*, and partly by Way of Extinguiſhment. And the Releaſee ſhall take Advantage of the Right veſted in him by ſuch a Releaſe, in a Writ of Right brought againſt him, 373.

But in all Caſes, if another, in reſpect of a Poſſeſſion prior to that of a Releaſee, recover the Poſſeſſion from him, either by Entry or by Action, the naked Right ſhall go with the Poſſeſſion, and no Part of it ſhall return to the Releaſor, notwithſtanding it were releas'd upon Condition, if the Condition were not broken before ſuch Recovery, 354, 371, 374. See *Right.*

H.

Releaſes enlarging an Eſtate, are only good between Privies, 361, 362. as being made by a Leſſor Y. to his Leſſee in Poſſeſſion or Remainder, 361, or to his Aſſignee of the whole Term, 408, or to the Huſband of ſuch a Ten't, 364, or by a Feoffee to the *Ceſtui qui*

U

Uſe at Common Law, 363, or by a Remainder Man to the particular Ten't, 365: But a Releaſe by a Leſſor to an Underleſſee of his Ten't, 365, or to a Ten't by Sufferance, is of no Force, 362.

Alſo ſuch Releaſes require that the Releaſſee have an Eſtate in him as being Ten't T. 359. L. Y. W. 362, or by Execution, *&c.* 364, or having a Remainder actually veſted in him, 361; therefore a Releaſe to one who has a bare *Intereſſe Termini*, or to any Leſſee Y. at Common Law before Entry, 71, 361, or to a Donee or Leſſee being ouſted of the Poſſeſſion, 358, or to an Infant's Leſſee having granted over his Eſtate, 365, can't enlarge the Intereſt, Eſtate or Right of the Releaſee; but they may extinguiſh the Rent, or bar the Action of the Releaſor, 358, 360.

A Releaſe, but not a Confirmation, 408, by Leſſor ſeiſed in Fee to his Leſſee Y. or *pur autre Vie*, gives the Releaſee an Eſtate for his own Life, without any Words of Enlargement, 365; But ſuch a Releaſe to a Ten't L. enlarges not his Eſtate, nor bars the Leſſor's Action of Waſte, 441; A Leaſe and Releaſe to *J. S.* and his Succeſſors gives him but an Eſtate for Life, 12.

A Releaſe by a Leſſor ſeiſed in Fee to the Leſſee and his Heirs, gives him a Fee, 364; ſuch a Releaſe by a Leſſor ſeiſed in Tail puts the Entail in Abeyance, and bars the Leſſor in an Action of Waſte, 441. But no Releaſe, Grant, or Confirmation can amount to a Diſcontinuance or Forfeiture, 426, 427, 436. See *Diſcontinuance* D.

I.

Releaſes enuring by Way of *Mitter le Eſtate*, alſo require Privity, but not any Words of Inheritance, 365. A Releaſe by one Parcener of Rent made to another, whoſe Eſtate therein is ſuſpended by her marrying the Ten't, paſſes the whole Eſtate of the Releaſor notwithſtanding ſuch Suſpenſion, 366; A Releaſe by one jointly ſeiſed with Husband and Wife, made to either of them, transfers the Moiety of the Releaſor to the Releaſee, 278, 279.

A Releaſe by a Jointenant to one of his Companions, enures properly by Way of *Mitter le Eſtate*, and the Releaſee is in the *Per* by the Releaſor, and ſubject to his Charges, &c. 271, 278. See *Jointenants* E. A Releaſe to all of them, enures partly by Way of *Mitter Eſtate* and partly by Extinguiſhment, for the Releaſees ſhall be ſuppoſed to be in from the Feoffor; 271, 279; By ſuch Releaſe, a ſuſpended Right, &c. in the Releaſor, ſhall be extinguiſhed, 279, 375, 361.

K.

Releaſes enure by Way of Extinguiſhment only againſt all Perſons, when the Releaſee cannot have the Thing releas'd. Being generally made, they extinguiſh the whole Eſtate of the Releaſor, 375, without any Words of Inheritance, 14, 375, tho' the Eſtate of the Releaſee were but for Life, 356, or ſuſpended, 374, yet they may be ſpecially limited for Life or Years, 375. See D.

L.

A Releaſe of Actions real and perſonal, bars all ſuch as are mix'd by the Common Law, 383; But it is no Bar to any Writ of Execution, 385, except a *Scire facias*, 382, nor does it make a Re-entry into Land, or Re-taking of one's Goods unlawful, 383, nor can any ſuch Releaſe be pleaded to an Appeal of Felony, as a Releaſe of all Actions or Appeals may, 384; A Releaſe of Actions real cannot be pleaded by any but the Ten't of the Land, 383, except the Diſſeiſor being Pernor of the Profits, who by the Statute is made liable to a real Action, 384, A Releaſe of Actions perſonal diſcharges all Cauſes of ſuch Actions, 380, 388, and an Attaint, & *Audita Querela*, 388, and a Bond to pay Money at a Day to come, 388, but not a Rent or Annuity before it is due, 389, or Covenant before it is broken, 389, or a Writ of Error to reverſe an Outlawry on an Original, 385; A Releaſe of the Debt, &c. diſcharges an Execution, 121, 387, 388. A Releaſe *omnium Loquelarum* or *Querelarum*, has the ſame Effect as a Releaſe of all Actions; but a Releaſe of

of all Demands or Claims, is of all other the moſt Extenſive, 388. See *Executors*, *Jointenants* D.

Relief.

On the Death of a Ten't in Socage, ſo much as the annual Rent amounts to, is due to the Lord for Relief, and may be diſtrained for preſently, 142, unleſs it be of ſuch a Nature that it can't be had but at a particular Seaſon, 143; But it is ſaid not to be due of a corporeal Service, 143; On a disjunctive Reſervation of two Things, Relief of either of them may be paid by the Heir at his Election, unleſs he have made Default, 143, 219.

The Relief of a Kt.'s Fee, Barony, &c. was the fourth Part of the yearly Revenue, 114, 131; It could not be taken in lieu of Wardſhip, nor could both of them be due from the ſame Heir, in reſpect of the ſame Land, 132. See *Biſhop* and *Executors*.

Remainder.

A Remainder limited by Deed ought to veſt in the Party to whom it is given, when the Livery is made to the particular Ten't, unleſs it be given on a Contingency, in which Caſe it muſt paſs from the Leſſor preſently, 482, 483, and regularly veſt in the Party during the particular Eſtate, 395.

A Limitation of a Remainder to the right Heirs of a Donor or Leſſor, 31, 32, or to take Place on the Alienation of the Leſſor's Reverſion, &c. is void, 484; Alſo no Grant of Lands or Warranty can enure by Way of giving a Remainder without a particular Eſtate, 483; And where both of them are by bad Title, the Deveſting of the particular Eſtate deveſts the Remainder out of King or Subject, 330, 453; Yet in many Caſes a Remainder once veſted may ſubſiſt after the particular Eſtate is ceaſed; 395. And where a Remainder is by good Title, and the particular Eſtate by a bad one, this may be defeated, and that ſubſiſt, 395, 396; But you can in no Caſe deveſt a Reverſion or Remainder without defeating the particular Eſtate, 422, conſequently a Confirmation of the for-

mer, is a Confirmation of the latter, 394, 395; Neither can you recontinue or be remitted to the particular Eſtate, without recontinuing the Remainder, &c. unleſs the Right to the Remainder be barr'd, &c. 395, 453.

The Execution of the firſt Eſtate executes the Remainder, 454; Execution of a Judgment got by a particular Ten't, may in many Caſes be ſued by him in Remainder, 338.

If there be Ten't L. with Remainder over, Ten't L. may vouch as Aſſignee, and he alone is Ten't to the Lord's Avowry, 412, 413; And at Law if he had loſt by Default, he in Remainder had no Remedy, 375, 376.

He, who is not Party to a Deed or Fine, can take no unavoidable Eſtate, but by Way of Remainder only, 449, 450.

Remitter.

Wherever one has a defeaſible Eſtate of Freehold, 443, in Deed or Law, 459. in his own or *autre Droit*, 447, either by Act of God, as Succeſſion, 456, or Deſcent, 460, or any Act of his own, for which he is not chargeable with Folly, as Purchaſe, 443, 446, or Re-entry by Force of a Condition, 288, during Infancy, 443, 446, or Coverture, 448; See *Baron and Feme* E. or by Livery on a joint Deed of Feoffment made in the Abſence of the Party, 406, or by Execution of a Remainder veſted in him by a Conveyance to which he is no Way Party or agreeing, 459, either as to the whole or Part of the Land, 446, to which he has an ancient Right, either at the Time when ſuch new Eſtates come to him, or after, 443; he ſhall be adjudged in of the ancient Right, 443, and the later Eſtate, whether gained by Diſſeiſin or Diſcontinuance, or Recovery in a falſe or feign'd Action; 460, and all Incumbrances, 443, and Conditions, 459, thereto annexed, either by the Party himſelf, or others, are abſolutely defeated, notwithſtanding the Infancy or Coverture, 443, &c. 457; of the Party who has Right to any latter Eſtate.

But

But one who has a bare Title of Entry, 443, or a Right without an Action, 445, 454, or an Action without a Right, 445, or a Right to an Entail bound by a collateral Warranty, 453, or a lineal Warranty and Aſſets, 498, ſhall not be remitted, neither can one be remitted by Force of an Eſtate veſted in him by Operation of the Statute of Uſes, 454.

He who has a Right of Entry, taking any Eſtate in the Land, muſt be remitted, yet he may be concluded by Matter of Record, or by Indenture to take Advantage of it, 464, 84. One Jointenant may be remitted without the other, 464, 465. See *Appendance.*

Rent.

Rent is not due till the Profits are receiv'd, 214, 389, and is loſt by an Eviction of the Land before the Day of Payment, 285, and needs not be tendered any where but upon the Land, 161, 298.

Any Rent by which Land is holden, whether of the Lord of the Fee, or of a Reverſioner, is called a Rent-Service; 214, and is diſtrainable in reſpect of the Fealty incident thereto, 135; A Rent reſerv'd on any Conveyance at this Day, by which the whole Fee paſſes, or granted by the Ten't of Land with a Clauſe of Diſtreſs, is called a Rent-Charge, which if it be created by an expreſs Grant of Rent out of Land, the Grantee has his Election to take it as a Rent or Annuity, 216, 222, if there be no *Proviſo* to the contrary, 221. See *Annuity* and *Election.* A Rent reſerved on ſuch Conveyance, or granted by a Tenant without ſuch Clauſe, is called a Rent-Seek, 215, for which there is no Remedy without an actual Seiſin, 246. See *Seiſin.*

A Rent reſerv'd on a Leaſe W. or other Rents to which a Diſtreſs is annex'd by the Equity of the Law, without Fealty, are called Rents diſtrainable of common Right, (214. See *Diſtreſs* and *Fealty.*) An entire Rent cannot be a Rent-Charge, as to Part of the Land, or as to one Grantee, and a Rent-Seek as to the other, but it may be a Rent-Charge for Life, and a Rent-

Seek after, 223, 224; A Rent-Service may become Seek, by being expreſly ſevered by Grant from the Seigniory or Reverſion, 229, or by the Lord Paramount's Purchaſe of the Tenancy, 231, yet if it were Part of a Manor before, it ſtill continues ſo, 230.

B.

Rent may be reſerv'd by Deed-Poll, 216; as well as by Indenture out of a corporeal Inheritance, 73, by any Conveyance which paſſes an Eſtate, but by K. only out of a Thing incorporeal, 73, 216; It can be reſerv'd to none but the Leſſor, 74, 300; And in a Leaſe by Two, ſo far as the Eſtate is derived from either of them, ſo far ſhall the Rent enure to him, 300. Hence it is, that Rent reſerved to one Jointenant without Indenture on a Leaſe by Two, ſhall enure to both, 74, 277, 278, 300; Yet if the Ten't of Land, and a Stranger join in a Feoffment rendring Rent, and the Feoffee grant that they may diſtrain for it, both may diſtrain, becauſe both are Parties, 300; Rent generally reſerved, enures as the Reverſion does, 73, but Rent reſerv'd ſpecially to the Leſſor or to him or his Heirs, determines by his Death, 74, 151; A Reſervation to the Heirs, excluding the Leſſor is void, 151, but a Reſervation of 20 *s.* to him, of a Pound of Cummin to them, is good, 300.

C.

A Rent-Service ſhall be apportiond by a Purchaſe of Part of the Land by the Lord or Reverſioner; but if it be ſuſpended in Part by his Wrong, it is ſuſpended in the whole, 224, 225; A Rent-Charge is wholly extinguiſhed by the Grantee's Purchaſe of Part of the Land, 225; Yet it may be extinct, or ſuſpended for Part by Act of Law, 226, alſo it may be divided by a Grant of Part thereof, or releas'd for Part, 225, and if it wholly determines as a Rent without any Default in the Grantee, the Law gives a Writ of Annuity, but not where it is apportioned only, 226; If Part of Land out of which a Rent is granted, be evicted by a Title Paramount, either in a Grantee or a Stranger, the

the whole ſhall Iſſue out of the Reſidue, 227, 228; But if Part of Land be evicted, out of which a Rent incident to a Reverſion is reſerved, the Rent ſhall be apportion'd, 227, 228; Any Rent created by Grant, is deſtroy'd by Cancelling the Deed, 409.

D.

At this Day Ex'ors, &c. may recover Arrears of any Rent due to Teſtator, 250; And a Leſſor L. may have Debt for Rent, 72. See *Diſſeiſins*, *Grants*, *Leaſes* and *Seiſin*.

Replevin.

Replevin is either by Writ or Plaint, 220; It muſt be brought by one who has an abſolute Property in the Goods, and cannot be brought by Two who have ſeveral Properties in them, 220.

Replication. See *Pleading*.

Reſceit. See *Baron* and *Feme* C.

Reſcous defined 246.

An innocent Perſon arreſted for Felony, without a *Capias*, may reſcue himſelf, 247, 248. See *Diſtreſs* C.

Reſervation. See *Exception* and *Rents* B.

Any Thing foreign or domeſtick, 142, lying in Render, Office, or Attendance, may be reſerved on a Leaſe, &c. 214.

On a Feoffment at Common Law, or Gift T. at this Day, if no ſpecial Tenure be reſerv'd, the Ten't holds by the ſame Services by which the Feoffor or Donor held, 33.

Reſponſalis 193.

Retraxit 211.

Reverſion.

A Reverſion is the Reſidue of the Eſtate left in him who makes a particular Eſtate, 31, 32; It is always attended with Fealty, as an inſeparable Incident, 215, being generally granted, it carries the Rent, &c.

together with it, but a general Grant of Rent passes not the Reversion, 231, 418.

Where but one particular Estate passes in a Gift or Lease, there is but one Reversion, 33; But where the particular Estates are several, there are several Reversions also, 267, 268. By the Severance of the Freehold of a joint Estate, the Reversion is severed, 277.

Revocation.

A Power of Revocation can be reserved only on a Conveyance, operating by the Statute of Uses, 324, 325; Being reserved to one from whom the Estate passeth, it may be extinguished by Release, Fine, or Feoffment as to the Whole or Part of the Land, 303, 325.

The same Conveyance may revoke the old Uses, and limit new, 325.

Right.

The Word Right is proper where an Estate is devested, 441, yet in some Conveyances it includes the Estate *in Esse*, 441; and in a Release it extends to a Title, &c. 352, 442.

A bare naked Right cannot be transferr'd at all by any Act of a Subject, 354; And if a meer Right, together with a wrongful Possession, be transferr'd by Release or otherwise, it is defeated by defeating of the Possession, 354, 355. Yet a naked Right vested in one by Act of Law, being coupled with a wrongful Possession, continues after the Possession is defeated, 355; by 32 *H.* 8. 9. He who buys or sells a pretended Right to Land, whereof he has not been in Possession a Year before, forfeits the whole Value thereof, 473.

Writ of Right.

A Writ of Right is not maintainable without a Seisin, which if it be not found in the Time of the King wherein it is alledged, the Demandant may be barr'd, 390; yet in some Cases it may be supported by a defeasible, 377, and even by a wrongful Possession, 377;

It lies not for one who has a Right of Entry, where another has the mere Right of the Land, 373, 383.

The Oath of the Jury in a Writ of Right is abſolute, 383. Where one Writ of Right may be jointly brought by Two, 432.

Riots and *Routs* 343.

Scire facias 387, 468. See *Execution.*

Seiſin.

The actual Poſſeſſion of a Leſſee Y. or Guardian is the actual Poſſeſſion of the Freeholder, 22, K.'s Seiſin for a Contempt, is the Poſſeſſion of him in whoſe Right he ſeiſed, 334.

An Attornment to a Grant of Rent gives a Seiſin in Law, and Payment of any Thing in the Name of Seiſin of the Rent, gives an actual Seiſin to maintain an Aſſiſe, yet it ſhall not be abated out of the Rent, 246, 416.

Guardian in Chivalry was poſſeſſed of the Wardſhip of the Body, but not of the Land without Seiſure, 56. See *Freehold, Entry, Diſſeiſin, Poſſeſſion, Curteſy, Dower* A. *Heir* D.

Serjeanty.

Ten't by Grand Serjeanty is one who holds of K. by ſome ſpecial Service to be perſonally perform'd to K. 114, 161, which if it be to be done to the Perſon of K. himſelf, cannot be perform'd by a Deputy without Licence, nor in many Caſes by an Infant, Woman, or Gentleman, under the Degree of a Knight, 162.

Ten't by Petit Serjeanty is one who holds of K. by rendring ſomething yearly touching the War, 163.

Services.

Entire Services are multiplied by a Stranger's Purchaſe of Part of the Land; but if they are valuable and not *pro Bono Publico*, they are extinct by the Lord's Purchaſe of Part, 218, 229; Services incident to a Tenure, are not diſcharged without ſpecial Words, 97; A Tenure by corporal Service, obliges the Ten't

Ten't to ſeek the Lord, if he be in *England*, but not to make a ſecond Tender thereof, after a Refuſal of the Firſt, unleſs the Lord had firſt requir'd it and been refus'd, and Rent needs not be tendered but on the Land, 161, 297, 298. See *Meſnalty*, *Tenure*, *Serjeanty*, *Fealty*, *Homage* and *Villain*.

Severance 212.

Simony 177, 178. See *Advowſon* C.

Socage. See *Guardian* C. *Relief* and *Bailiff*.

Statute.

What is a Statute ſhall be determined by the Judges, 150; The Aſſent of K. Lords and Commons, to what is entred on the old Parliament-Rolls, ſhall be intended, tho' it do not expreſly appear, 150.

Every one is a Party, and preſum'd to conſent to an Act of Parliament, 146.

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A.

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B.

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Releaſe

Releaſe with Warranty to a Diſſeiſor, or Diſcontinuee of Land whereof my Father was ſeiſed, or my elder Brother, *&c.* being Donee in T. or Leſſee L. with a Remainder to me, 467, makes a Feoffment with Warranty, 480. A Warranty made by a Parcener of Lands in T. on a Feoffment of the whole Land is collateral to the Siſter as to one Moiety, and lineal as to the other, 479. But a Warranty by a Donee in ſpecial Tail is lineal to the Iſſue for the whole Land, 480. A Warranty by Donee taking by a Limitation to him, and the Heirs Male of his Body, with a Remainder to the Heirs Female of his Body is lineal to the Daughters, as well as to the Sons, 482.

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C.

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D.

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By 11 *H.* 5. 20. No Warranty of a Ten't in Dower, 479; and by 4 & 5 *Annæ* 16, No Warranty of any other Ten't L. is any bar to the Heir, 467, 468. By *W.* 2. lineal Warranty without Aſſets is no Bar of an Eſtate T. 480, and by 4 & 5 *Annæ* 16, collateral Warranty made ſince that Statute by one who has no Inheritance is wholly void as to the Heir, 436.

E.

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F.

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H.

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The Warranty implied in Exchange or Partition, 491; and alſo an expreſs Warranty binding particular Lands, gives not an Execution in Value of Lands in general, 158. See *Voucher*.

I.

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Rent, may both vouch and rebut the Leſſor and his Heirs and Aſſigns, 489, but neither the Heir of a Feoffor can be vouched, nor can the Heir or Aſſignee of a Feoffee vouch by Force of an expreſs Warranty, unleſs they be named, 491; Yet in ſome Caſes where one loſes by Act of Law a Warranty annexed to a Feoffment made to him, he may vouch the Feoffor of his Feoffor by Implication of Law, 492, 498. An Aſſignee by Deed or Parol, 493; of Part of the Land may vouch, and ſo may an Aſſignee of Part of the Eſtate, with a Remainder over, 492, but none ſhall vouch as Aſſignee who comes in by Wrong, and not in Privity of Eſtate, 493; Nor can any Man vouch as Aſſignee to himſelf, 493, 497; Yet in ſome ſpecial Caſes, one may vouch himſelf together with another, 497.

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Way

Way 101.

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